

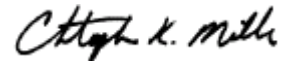
REQUEST FOR COUNCIL ACTION

Date: 03/23/2009
Item No.: 13.c

Department Approval



Acting City Manager Approval



Item Description: 2030 Comprehensive Plan Status Update and Next Steps

1.0 BACKGROUND

- 1.1 On January 26, 2009, the Roseville City Council granted preliminary approval of the 2030 Comprehensive Plan and staff has submitted the plan to the Metropolitan Council for its review of the plan. It is anticipated that the agency will complete its review and that the plan will be brought back to the City Council for final adoption in spring 2009.
- 1.2 State statutes require that City's review their official controls as part of the decennial comprehensive plan updating process and, if necessary, revise these control to make them consistent with the comprehensive plan; the statute allows the city nine months from the date of final adoption to complete this task. The official controls identified in Chapter 11 of the Comprehensive Plan are zoning, subdivision, and related ordinances, public ways and public property, and master plans.
- 1.3 In preparation for the review of the Zoning Code, the City has allocated \$35,000 in its 2009 budget from the Community Development Enterprise Fund to hire a consultant to assist with the revision of the City's Zoning Code. Staff foresees the consultant serving as the zoning expert to help frame the overall code and having City staff to undertake much of the code writing.
- 1.4 Staff has prepared a draft request for qualifications (Attachment A) and has taken it to the Planning Commission for its review. On February 4, 2009, the Planning Commission unanimously passed a motion recommended that the City Council authorize staff to send the request for qualifications to consulting firms. Attachment B are the meeting minutes from the Planning Commission meeting.
- 1.5 Chapter 11 of the 2030 Comprehensive Plan identifies that the City Council needs to determine if any of the pre-2009 master plans should be addressed in the updated comprehensive plan. It states: "For master plans adopted before 2009, the City Council shall review each plan and determine whether each one should be addressed in the Comprehensive plan, and if so, how it will be addressed in the Comprehensive Plan pursuant to this policy."

2.0 POLICY OBJECTIVES

- 2.1 Undertaking a thorough review and updating of the City's official controls at this time will provide an opportunity to better link them to the community goals and objectives identified in both the 2030 Comprehensive Plan and Imagine Roseville 2025.

3.0 FISCAL IMPACTS

31 3.1 The hiring of a consultant was part of the 2009 Community Development budget, \$35,000 was
32 allocated for this purpose. There are not any other anticipated fiscal impacts due to this project.

33 4.0 STAFF RECOMMENDATIONS

34 4.1 Zoning Code Update: The City of Roseville's has not undertaken a comprehensive update or
35 revision of its Zoning Code since its adoption in May 1959. Over time this code has had
36 innumerable revisions to maintain functionality. The result of this is a code that is oftentimes
37 difficult to understand, internally inconsistent, and unwieldy to administer.

38 4.1.1 Staff is recommending that the update to the Zoning Code should implement "form-
39 based" or a hybrid style code for all or a subset of the zoning districts instead of
40 traditional Euclidian zoning. (The current code is a Euclidean-type code). The 2030
41 Comprehensive Plan categorized future land uses based on the desired scale of new
42 development, not on a specific set of uses. The regional business, community business,
43 and neighborhood business lend themselves to utilizing form-based code, which instead
44 of relying on a series of regulations on use, clearly sets forward a set of design
45 regulations that achieve the desired outcomes for the specific district. A restaurant,
46 coffee shop, or retail store could be in any of these categories, but the key is achieving
47 the neighborhood, community, or regional type development how the buildings housing
48 these uses are designed. Attachment C is background information on form-based code.

49 4.1.2 Staff recommends a two-step request for qualifications/request for proposal process
50 would be appropriate for this project. Attachment A is a draft request for qualifications
51 document, which includes a project timeline. Upon receipt qualification packages, staff
52 will review the submission and select up to five firms to seek a full proposal. A request
53 for proposal will be prepared at a later date and brought to the City Council for approval.
54 Based on the proposal packages and interviews, the City Council would authorize the
55 hiring of the preferred consultant.

56 4.1.3 Staff also recommends significant involvement of both the Planning Commission and
57 City Council with the update of the zoning code. Working with the consultant, staff
58 envisions breaking the code into related segments (e.g. residential districts, commercial
59 districts, environmental regulation, etc.). The consultant and staff will work together to
60 create draft sections and bring them to the Planning Commission and City Council.
61 Based on the input revisions would be made and a formal public hearing would be held
62 with the Planning Commission and brought to the City Council for formal adoption.

63 4.2 Master Plan Review: Past Roseville Comprehensive Plans have included, through adoption, an
64 assortment of related planning documents (e.g. master plans, streetscape plans, and roadway
65 plans). At this time, the 2030 Comprehensive Plan does not include any of these documents;
66 however, as described in Item 1.5 of this report, it sets forth a process for the City Council to
67 specifically review pre-2009 master plans for potential inclusion on the Comprehensive Plan
68 Update. The following are the documents that are directed to be reviewed: Twin Lakes Business
69 Park Master Plan, 1998 James Addition Report, Arona/Hamline Master Plan, City Center Plan,
70 and Cornerstone Program.

71 4.2.1 As review of these master plans for inclusion in the 2030 Comprehensive plan is not
72 contingent upon any Metropolitan Council review of the plan, the City Council should
73 undertake determining if and how each of these documents should be addressed in a
74 future revision to the Comprehensive Plan after final adoption of the plan. Staff proposes
75 that it review each of these plans for consistency with the adopted plan and make

76 recommendations to the Council as to their continued relevancy today. Upon
77 determination of relevancy, staff would return to the Council with a recommendation as
78 to how to integrate key items of the plan into the Comprehensive Plan after it has been
79 adopted by the City Council.

80 **5.0 REQUESTED COUNCIL ACTION**

81 5.1 By motion, authorize staff to seek qualifications from consultants to assist with the preparation
82 of revisions to the City's Zoning Code.

83
84 Prepared by: Jamie Radel, Economic Development Associate

Attachments: A. Draft Request for Qualifications
B. February 4, 2009 Planning Commission Minutes
C. Background information on form-based code

Zoning Ordinance Update *Request for Qualifications*

City of Roseville, Minnesota

1. Introduction

The City of Roseville is seeking qualifications from consulting teams experienced in the creation and revision of municipal zoning codes. The City has not undertaken a comprehensive rewriting of its zoning code since its adoption in May 1959. Over the last 50 years, innumerable revisions have been cobbled on to the original ordinance; however, the cumulative effect of this process is the creation of a code that is difficult to understand and often cumbersome to administer. A copy of the existing zoning code can be found at www.ci.roseville.mn.us/DocumentView.asp?DID=46.

The goal of this project is to have a zoning code that:

- Promotes high quality residential renovation and development, creative infill projects, and innovative commercial and industrial redevelopment to allow the community to prosper into the future
- Advances the City's efforts to become a more environmentally sustainable community
- Integrates design standards through all zoning districts
- Creates a code that is can be understood by the general public, administrable by City staff and elected officials, and is constant with the City's 2030 Comprehensive Plan

To achieve these goals, the City anticipates that the zoning code must undergo a significant revision, including reorganization of the code, creation of new zoning districts, amendments to existing districts, and an overhaul of the environmental management sections. As part of this updating process, the City would like to explore the use of form-based or a hybrid code in order to better regulate design and land use within several of the future land use categories. As part of its 2030 Comprehensive Plan, the City has created several new future land use categories including Community Mixed Use, Neighborhood Commercial, Community Commercial, Regional Commercial, and Office. As defined, these new categories shift the City's future land use focus from a description of use to a description of development scale and form.

As Roseville is located within the jurisdiction of the Metropolitan Council, the City must make its zoning code consistent with its adopted plan within nine months of its final approval; final approval of the Comprehensive Plan is expected to occur during spring 2009.

2. General Scope of Services

The scope of the project can be summarized in to three main categories:

- General review of the Zoning Code
- Code revision and development
- Code adoption process

A detailed scope of services will be provided as part of the request for proposal process.

The City has budgeted \$35,000 to undertake this work in its 2009 budget. It is anticipated that city staff will work closely with the selected consulting team throughout the revision process in order to complete it in a cost-effective manner.

3. Selection Process and Tentative Timeline

Submittals will be reviewed by a selection committee comprised of city staff. The committee will select a short list of individuals/teams from which to request a full proposal. Qualified individuals/teams will have extensive experience in writing and implementing zoning code, demonstrated experience in both traditional Euclidean and form-based code development, and the ability to work affectively with city staff, advisory commissions, and city councils.

Qualifications Due:	April 15, 2009
Review of Qualifications:	April 16- 21, 2009
Recommendation to Council:	April 27, 2009
RFP to Selected Firms:	April 28, 2009
Proposal Due:	May 22, 2009
Interviews:	May 1-5, 2009
Recommendation to Council:	June 15, 2009
Complete Work:	Winter 2010

4. Submission Requirements and Deadline

The qualifications package is limited to 20 pages and must include:

- A description of the team and the team's capacity to complete the work within the required timeframe
- Project descriptions of similar projects
- Resumes of team members

Send 5 copies and an electronic version of the qualifications package to:

Patrick Trudgeon
Community Development Director
City of Roseville
2660 Civic Center Drive
Roseville, MN 55113

All qualification packages must be received by 4:30 p.m. on Friday, March 13, 2009.

9. Contact Information

If you have questions regarding the request for qualifications, please contact Community Development Director Patrick Trudgeon at pat.trudgeon@ci.roseville.mn.us or at (651) 792-7071.

Extract of February 4, 2009, City of Roseville Planning Commission Meeting

- a. **PROJECT FILE 0017: Review a Request for Qualifications (RFQ) to be sent to several consultants in preparation for rewriting Roseville's Zoning Ordinance.**

Mr. Paschke provided staff's proposed process for a two (2) step Request for Qualifications (RFQ's) for hiring a consultant to assist staff and the Planning Commission with revision of the City's Zoning Code, in accordance with the updated Comprehensive Plan.

Discussion included the role of the Commission and applicable timetables for the consultant and Commission within the proposed work plan and to facilitate public hearings throughout the process and other business before the Commission; and the level of code amendments to be considered with some being more detailed or substantial than other

MOTION

Member Doherty moved, seconded by Member Bakeman to RECOMMEND TO THE CITY COUNCIL to authorize staff to seek qualifications from consultants to assist with the preparation of revisions to the city's zoning code.

Ayes: 7

Nays: 0

Motion carried.

TES

should not be surprising, because zoning originated as a means to isolate and segregate land uses. Eighty years after the U.S. Supreme Court authorized local governments to zone land, zoning practice is still mired in solving problems of that era rather than the current one.

Some land uses must be segregated because they create excessive noise or truck traffic. However, many other land uses can coexist and benefit from their proximity to each other, yet are forbidden from doing so because the techniques of zoning by use have become so entrenched as to seem utterly natural to citizens and elected officials alike.

One key to the harmonious mixing of land uses is to arrange them on streets and blocks that function together to create an attractive “public realm.” This realm may be a dignified park or plaza, but it is most often a street of moderate dimensions and traffic flow with sidewalks and rows of street trees.

In urban settings, frontyards are small or nonexistent; in less intensive settings, they are ample and effectively extend the public realm to include the frontyards on both sides. When buildings and the public realm are consistently shaped in this manner, the uses within individual structures are far less important than in conventional suburban configurations.

Form-based codes regulate the key aspects of urban form, such as the height of buildings, how close structures are to the street, and windows and doors on walls facing streets and other public spaces. They also govern the streets themselves so that the streets and buildings work together to create a desirable public realm—adding value to every property in the process.

Form-based codes are sometimes confused with design guidelines, which try to control how buildings look. Design guidelines emerged from the historic preservation world

Downtown Kendall

THIRTY-FIVE YEARS AGO, Dadeland Mall’s first buildings emerged on Kendall Drive, a narrow country road just beyond the Miami metropolis. Fast-forward to today, when two transit stops are located within walking distance—but who would walk clear across a mall parking lot in the Florida heat?

Now that the region has sprawled as far as it can go toward the Everglades, great sites like the 338 acres (136.8 ha) that include the 1.4 million-square-foot (130,232-sq-m) Dadeland Mall seem wasted on a low-slung automobile-dominated pattern.

Redevelopment planning was instigated by a local business group, Chamber South. The resulting plan seemed unreal at the time. The parking lots and single-use apartment buildings were gone; the mall remained but was hidden behind new structures.

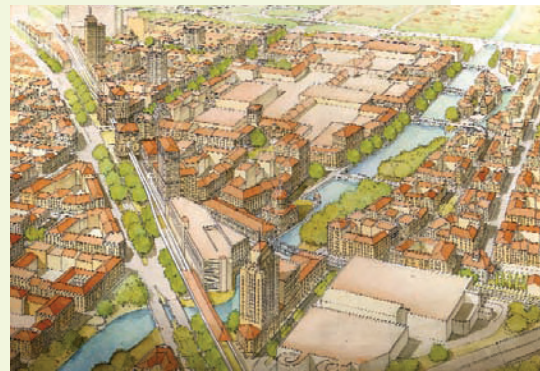
The master plan featured mixed-use buildings fronting on a network of interconnected streets, parking garages placed

and are well suited to evaluating how a renovation or new structure would fit into the context of a historic district. Design guidelines are also used to influence the architectural style of buildings in other contexts.

Design guidelines usually require laborious reviews by public agencies, eliminating the predictability that is the hallmark of a good regulation. Well-written form-based codes are more objective and easier to implement than design guidelines and they avoid most of the types of quarrels that erupt over architectural style.

Beyond Greenfield Development

Initially, form-based codes were developed as sets of instructions for developers to use when developing greenfield sites. Later, they were



The vision for downtown Kendall.

mid-block to replace the vast expanses of surface parking, and the transit stops becoming the focal points with the greatest intensity of development.

To implement this vision, a form-based code was adopted by officials of Miami-Dade County in 1999 to replace the prior suburban zoning. Downtown Kendall is now emerging from the ground, remarkably like the 1998 master plan.

adapted through the planned unit development (PUD) process as a regulatory tool for local governments to ensure that promised development patterns were carried out. Gaithersburg, Maryland, for example, used this approach to accommodate the development of the Kentlands during the late 1980s; there was no other regulatory technique available for creating new traditional neighborhoods in that city.

A dozen years ago, form-based codes began being used in redevelopment and revitalization scenarios. Coding techniques had to evolve once the interests of hundreds of different property owners would be affected. West Palm Beach, Florida, adopted a form-based code in 1994 for its entire downtown.

Columbia Pike

ARLINGTON COUNTY, VIRGINIA, has seen explosive development along the Metro (subway) corridors over the past 30 years, while Columbia Pike, the 3.5-mile (5.6-km) “Main Street” for the southern portion of the county, has languished.

Although it is a historic thoroughfare running from the Pentagon to the Arlington/Fairfax County line, its current form resembles strip commercial zones everywhere: an arterial that carries approximately 30,000 vehicles a day, varying in width from four to six lanes and lined primarily with parking lots and low buildings.

Columbia Pike was the most underdeveloped area in a county that is otherwise

built out. County leaders wanted to encourage economic development and also create a mixed-use pedestrian environment that would allow for future light rail or bus rapid transit.

During an intensive two-year visioning process, the county recognized that its regulations would never produce the desired results, a traditional Main Street. The effort led to the adoption of a form-based code in 2003.

The Columbia Pike code is optional—all existing zoning remains in place—with incentives such as expedited review to encourage its use. Since passage, the vast majority of development proposals have opted to use the new form-based code.

historic form of the older sections of town, rather than the sprawl around the edge, and to rebuild “better than before.”

The next frontier for form-based codes is to carry out regional planning. By extending the tools used to regulate urban form in small areas, regional development patterns can also be coded (for instance, laying out interconnected road networks and allowing for regional stormwater management). It is no longer credible to believe that incremental development decisions are sufficient to shape regional growth patterns.

Form-based codes focus on end results—the creation of desirable physical places. They are ideal for jurisdictions seeking a fundamental change in urban form and character—for instance, when redeveloping areas that have become obsolete or which were poorly planned at the outset.

Whether it is a greyfield conversion of a dead mall or revitalization of an aging commercial corridor, a shared physical vision for the desired character is the essential first step. Form-based codes quantify that vision into physical parameters that replace the pre-existing zoning standards.

Typically, the result is the regulation of private and public development to create valuable public spaces that did not exist before. For instance, overly wide streets can be converted into places where pedestrians and commerce can meet to their mutual benefit; new public spaces such as plazas can create centers of attention in homogeneous subdivisions.

Form-based codes can also be used for finer-grained projects, such as infill redevelopment downtown or in bypassed city neighborhoods, or as a tool for regulating new construction in historic districts. These codes can be written to protect the existing urban fabric, or they can serve to transform it.

National Trends

Cities and counties across the country are replacing parts of their conventional zoning with form-based codes, to enable local governments to carry out visionary place-making plans.

One prominent example is in unincorporated Dade County, Florida, where land around the Dadeland Mall, a regional shopping attraction, is being converted into a downtown for the sprawling community of Kendall.



Existing conditions produced by the conventional system along Columbia Pike.



The effect of new standards for the public realm and private building placement.



An illustrated vision for future private development.

In the wake of Hurricane Katrina, many coastal communities are discovering that their historic cores cannot be rebuilt after disaster strikes. The magnitude of the recovery effort

has led many of them to explore a model form-based code known as the SmartCode to sidestep the need for customized codes for each community. The goal is to re-create the

Another is Columbia Pike, where Arlington County, Virginia, officials seek to revitalize an aging commercial corridor that has seen little development over the past 40 years. Even under the current strong market conditions, redevelopment under existing zoning has proven virtually impossible.

In St. Lucie County, Florida, 28 square miles (72 sq km) on the outskirts of Fort Pierce have been planned by county officials for several new towns and villages. A new form-based code has just been adopted to ensure that the towns and villages are built with traditional neighborhoods while the surrounding countryside is preserved for agriculture and habitat restoration.

Municipal officials in Petaluma, California, have created a new vision for Central Petaluma, which has been dominated by freight transport along the Petaluma River and rail lines. A new form-based code has replaced the city's conventional zoning for the entire area and promotes narrower streets, wider sidewalks, and minimum building heights to create urban character near the historic downtown.

Advantages

More user friendly than conventional zoning, form-based codes are written in plain English and make liberal use of matrices, diagrams, and other illustrations.

Form-based codes are written to fulfill a specific physical vision for a place. Which neighborhood patterns should be retained and protected? Which are obsolete and should be replaced? These decisions need to be based on a broad public consensus.

This "upfront" agreement on the desired future, often reached through a public participation charrette or some other visioning method, allows for the creation of precise and objective codes that can remove much of the politics and uncertainty from the approval process.

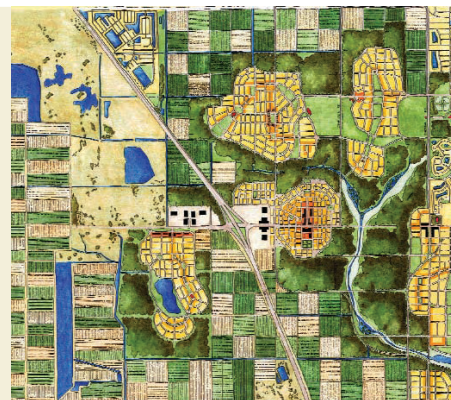
A code with clear and concise rules can deliver predictability for both the developer and the community. For fundamental issues about the creation of public spaces, such as avoiding blank walls or parking lots along sidewalks, the rules are very strict. Other issues are truly less important for urban form, such as micromanagement of parking or of what uses can take place in each building

St. Lucie County

WAVES OF DEVELOPMENT across Florida are rendering many communities unrecognizable. As the wave began to displace valuable agricultural lands on the outskirts of Fort Pierce in St. Lucie County, it collided with local residents who understood the damage inherent in poorly planned, widely dispersed development.

After growth was temporarily stopped, residents began to realize it was the form of new development—not growth itself—that was their real concern.

Assisted by the Treasure Coast Regional Planning Council, the community and county officials agreed on a master plan for 28 square miles (72 sq km) of farmland. This plan included several new towns and villages surrounded by countryside that would be preserved for agriculture and habitat restoration. A central backbone system for water management would



TREASURE COAST REGIONAL PLANNING COUNCIL

Concept for Towns/Villages/Countryside plan in St. Lucie County.

replace the current system of straight-line agricultural canals that overdrain the land and pollute the Indian River Lagoon.

A new form-based code has just been adopted to ensure that the towns and villages are built with traditional neighborhoods while the surrounding countryside is permanently preserved through the transfer of development rights.

Central Petaluma

CITY OFFICIALS IN PETALUMA, California, have created a new vision for Central Petaluma, a 400-acre (162-ha) area adjacent to Petaluma's historic downtown.

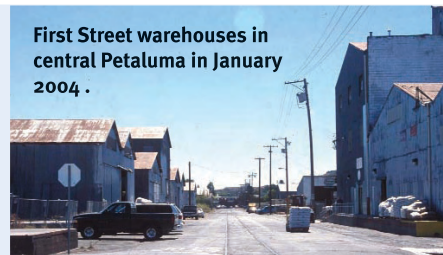
This plan would extend the form and character of the pedestrian-oriented downtown into an area historically occupied by industrial uses that depended on a river-based economy and transport system that no longer exists.

With other parts of Petaluma already built out, this area represented a unique opportunity for new development that could complement the historic downtown and connect it to the river.

Central Petaluma will contain a range of residential and commercial uses that can coexist in proximity to one another to create a lively urban environment. The historic Petaluma Depot would be restored for passenger service and become the bus transit center while the river itself becomes the focus of civic life.

A new form-based code, based on the model SmartCode, has replaced the city's conventional zoning for the entire area. Dif-

First Street warehouses in central Petaluma in January 2004.



First Street condos and warehouses in July 2006.



FISHER & HALL URBAN DESIGN

ferent sections of the site are coded for varying densities, minimum and maximum building heights, parking areas, and percentages of frontage types. The code clearly describes new streets, open spaces, roads, and even structures facing the river. Of greatest importance, the new code allows for the mixing of stores, homes, and workplaces as found in the historic downtown.

For More Information

- ▷ Form-based codes: www.formbasedcodes.org
- ▷ Downtown Kendall: doverkohl.com/project_detail_pages/kendall_new.html
- ▷ Columbia Pike: See “New Planning Tool Adopted,” *Urban Land*, June 2003, page 32
- ▷ St. Lucie County: tcrpc.org/departments/studio/st_lucie_charrette/implementation_schedule.htm
- ▷ Central Petaluma: cityofpetaluma.net/cdd/csp.html

over time; those rules are much more lenient than in today’s zoning codes.

A well-written form-based code avoids the typical scenarios facing developers:

- ▷ Wasting time and money on a concept that ends up being unacceptable to a community.
- ▷ Fearing to propose something desirable because too many variances or discretionary approvals would be required.
- ▷ Inquiring as to desirable uses on a site and being told with a shrug to come back with a proposal.

The guessing game is removed when a community writes what is desired into its codes. The new process can replace grueling public hearings in which each proposal is picked apart, redesigned from the dais, or sent back to the drawing board, only to end up with unexpected special conditions or outright denial influenced by whoever shows up at the final public hearing.

When consensus has been built at the beginning of the planning and coding process, and the rules are clear and concise, the approval process can be much quicker, if not absolutely streamlined. As Peter Park, Denver’s planning director, has asked, “Why shouldn’t Denver streamline permitting of development that matches what the city wants?”

Disadvantages

The advantages of form-based codes come with certain costs. Building consensus on a physical vision takes time, patience, and resources—and there is no guarantee of success.

Once a shared vision has been reached, it must be converted into objective code provisions that replace contradictory provisions in the existing ordinances. Without this step, a visionary plan stands little chance of influencing the future of a community.

It is a true test of patience and perseverance for elected officials to stay the course when the inevitable naysayers appear at the last minute and want to rethink the shared vision that they were too busy to help formulate. Developers, who stand to benefit from the new system, often remain silent or even block the new code’s path if they are focused only on their current project rather than the long-term vitality of the community.

Developers who are locked into old development patterns may also object to form-based codes. Change can be difficult; developers of conventional strip centers may admire more intense mixed-use buildings, but fear the risk of a different development pattern or fear out-of-town competitors with more experience with mixed-use buildings or traditional neighborhood development techniques.

The development approval process in much of the United States has proven to be antagonistic, expensive, unpredictable, and unsustainable. Form-based codes are crafted around consensus, straightforward to implement, and built on the ideal of creating places of enduring value. As Arlington developer David DeCamp stated when discussing the Columbia Pike experience, “It helps to begin with the end in mind.”

MARY MADDEN is a principal in the Washington, D.C.-based urban design and town planning firm Ferrell Madden Associates, LLC. **BILL SPIKOWSKI** is a principal in Spikowski Planning Associates, located in Fort Myers, Florida. They are founding board members of the Form-Based Codes Institute.

Date:

May 9, 2008

Project Name:

Charrette for San Jose District, City of Bisbee

Attention:

City of Bisbee: John Charley, Community Development Director; Melanie Greene, Planning Assistant

A PRIMER ON FORM-BASED CODES

“A form-based code is one that is based primarily on “form”—urban form, including the relationship of buildings to each other, to streets and to open space, rather than based primarily on land use. “

A Form-Based Code is a development code that provides the developer/applicant greater flexibility in permitted land uses in exchange for more stringent regulations controlling urban form. These types of codes support mixed-use, pedestrian-friendly and mixed housing development more effectively than conventional codes do because they provide greater guidance on how buildings are expected to face the street, adjacent residential neighborhoods and open spaces. Form-Based Codes are becoming increasingly attractive to municipalities that want greater control over how buildings look and feel. Cities that have adopted Form-Based Codes include Bend and Portland in Oregon; Petaluma, Pleasant Hill, Palo Alto and Hercules in California.

A BRIEF COMPARISON OF CONVENTIONAL CODES AND FORM-BASED CODES

URBAN FORM GENERATING CHARACTERISTICS

CONVENTIONAL CODES

- Include extensive lists of permitted, prohibited and conditional uses by zone. Many land uses in conventional codes lists are outdated and do not reflect the nature of contemporary employment models or dwelling types
- Often disallow a mix of uses
- Prohibit adaptability of buildings to other uses over time
- On zoning maps, land use designations typically begin and end at the center of the street or Right of Way

FORM-BASED CODES

- Consider the building “walls” that frame the Right of Way (often referred to as the “public realm”) as one of the primary determinants of form
- Regulating plan zone designations typically transition at the back of the lot
- The same or similar development standards typically apply to both sides of the street
- Land uses allow a much broader range of uses within a zone or subarea; also allow a greater mix of uses
- Many uses are allowed if they meet performance standards

GRAPHICS AND PROCESS CHARACTERISTICS

CONVENTIONAL CODES	FORM-BASED CODES
• Development standards are not illustrated and in many conventional codes the built result of the development standards is not fully understood and/or has never been tested or modeled • Abstract, hard to understand development standards such as FAR (Floor Area Ratio) are used to measure development capacity on site but do not provide a very clear picture of development that results • Zoning map, land use designations and development standards are the primary tools of the conventional code	• Greater use of graphics to explain community goals and desired urban form to applicants, neighborhood groups and administrators • A Regulating Plan replaces the conventional code zoning map and land use designations; development standards are keyed to the Regulating Plan • Development standards and expected building form is illustrated in plans, sections, 3-D models and/or axonometrics, and photos • Other innovative tools are used by some form-based codes such as Building Types, which codify historic and/or desirable building types. Codes that use this tool include NorthWest Crossing in Bend, Oregon and City of Ventura, California

What are the advantages of Form-Based Codes?

- Form-based codes are better at illustrating community plans and vision
- Building and street design is coordinated
- Urban form is more predictable
- A more gradual transition between adjacent areas with different development intensities is easier to achieve
- Can specify the tapering of height, bulk, massing and lot coverage of buildings toward residential and/or natural edges
- High density development is more carefully designed, attractive and compatible

What are the pitfalls of Form-Based Codes?

- Cities must consider what approving bodies will administer the code and whether current review processes and review bodies will be adequate; rarely is a form-based code able to be administered without some modification
- Some cities have legal restrictions against using illustrations to set development standards; in these cases the illustrations are used to augment text and numerical standards but are not legally binding

What is a Hybrid Code?

- One that incorporates the form-based code approach toward form, but uses the provisions, processes and standards from the current code
- Often take the form of a chapter within the code, similar to a special district or an overlay
- Hybrid codes cross reference other sections of the existing code for development standards such as parking dimensions or landscaping standards

- Hybrid codes are more integrated—not stand alone codes. Some “pure” form-based codes that have been adopted are stand alone codes and because of unresolved administration issues, they are optional for applicants; not mandatory

What are some Form-Based and Hybrid Code fatal flaws?

- When allowed land uses are too complex and don’t allow a mix of uses
- When there is an unresolvable difference between the development capacity allowed by existing zoning and future urban form goals. This is a particular problem with form-based and hybrid codes applied to infill areas
- When there is an unresolvable difference between the existing development standards and future urban form goals
- The vision and plan process must precede the making of a form-based or hybrid code

A BRIEF SUMMARY OF FORM-BASED CODE TYPES

In a form-based code, the development standards that dictate urban form are linked to a Regulating Plan. A Regulating Plan is similar to a zoning map, but with less emphasis on land uses and more emphasis on the building shape, street type and neighborhood character in each zone. Development standards define and shape the public realm by providing pre-set dimensions for every aspect of the site and building.

Form-based codes can take several forms:

- **Street-based** The Regulating Plan locates private realm development standards by street type; that is, the development standards for all site and building characteristics is governed by the site’s relationship to pre-defined street types. In addition to setting the private realm standards, the Regulating Plan defines elements within the public realm (e.g. sidewalks, travel lanes, on-street parking, street trees, street furniture, etc.). This type of form-based code can be useful for areas where streets have not yet been platted.
- **Frontage-based** The Regulating Plan locates private realm design standards by frontage type; that is, the development standards for all site and building characteristics is defined by the edge condition where it meets the primary street (frontage). Frontage-based FBCs may also define street type, but the development standards are not (or not always) tied to street type. This type of form-based code can be useful for areas where streets are already designed and/or built.
- **Street-Frontage Hybrid** Development standards are tied to specific frontage/street combinations.
- **Building Type-based** The Regulating Plan controls the locations of pre-defined building types. The development standards define the configurations, features, and functions of buildings.
- **Transect-based** The Regulating Plan articulates a cross section of street types, frontage types and/or building types along an urban/rural continuum to understand where different uses or building types fit or are inappropriate. The “pure” transect-based FBC uses the SmartCode transect with clearly defined zones from T1 to T6. This system was first created by DPZ (Duany Plater Zyberk).
- **Modified Transect** The concept of the transect is modified to correlate with the existing or zoned local urban to suburban characteristics.

IMPLEMENTATION OPTIONS

Form-based codes replace existing zoning codes and can be either mandatory or optional. There are several options for implementation

- **Integrated** A form-based code can be integrated into the existing code, applied as a “by right” designation to selected zones, and cross-referenced to existing code provisions, such as administrative procedures and/or land uses.
- **Optional parallel** Alternatively, it can take the form of an optional parallel code system--a self-contained special chapter with unique provisions, not cross-referenced to other parts of the code, available as an option in designated zones.
- **Floating zone** Finally, an FBC take the form of a floating zone (either integrated or optional/parallel) which is triggered by an application to rezone a property.

Form-based codes are often confused with design guidelines, however they are not discretionary. While they offer flexibility like design guidelines do, they do so by offering choices between objective standards, rather than by offering multiple ways of meeting an aspirational guideline.



FORM-BASED CODE EXAMPLES FOR SAN JOSE

NorthWest Crossing Prototype Catalogue, Bend, Oregon

This integrated, mandatory building-type-based code (adopted in 2002) has been used to build out an award-winning 500-acre mixed-use, mixed housing neighborhood on the west side of Bend.

Link:

http://www.northwestcrossing.com/Bend_Oregon_Real_Estate/Building_Guides/Prototype_Handbook/

Hercules, California

This integrated, mandatory street-based code (created in 2001) has been used to build out a new town in this California Bay Area town.

Link: <http://www.formbasedcodes.org/images/CentralHerculesFBC.pdf>

Columbia Pike Form-Based Code, Arlington County, Virginia

This integrated, mandatory street-based code (adopted about 2003) has been used to transform 3.5 miles of auto-oriented, region-serving highway to transit-oriented, pedestrian-friendly commercial mixed-use.

Link:

<http://www.arlingtonva.us/Departments/CPHD/Forums/columbia/current/CPHDForumsColumbiaCurrentCurrentStatus.aspx>

Loma Rica Ranch Specific Plan

This developer-driven form-based code, created in 2007, is a good example of how to use a form-based code to identify distinct, complementary neighborhoods. It includes an Architectural Standards section and a well-developed Open Space and Conservation section.

Link: http://www.cityofgrassvalley.com/services/departments/cdd/SDA_LomaRicaRanch.php

Santa Ana Renaissance Specific Plan, Santa Ana, California

This draft Form-Based Code provides a comprehensive example of form-based code approaches, including standards for open space network, streetscapes, building types and architecture.

Link: http://www.santa-ana.org/news/0710_renaissance.asp

OTHER RESOURCES

Form-Based Codes Institute (FBCI)

<http://www.formbasedcodes.org/>

Cleveland-Marshall College of Law



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Back to the Future: Is Form-Based Code an Efficacious Tool for Shaping Modern Civic Life?

By

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Working Paper

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Back to the Future: Is Form-Based Code an Efficacious Tool for Shaping Modern Civic Life?

Lolita Buckner Inniss*

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Abstract

This Essay serves as a critique of the New Urbanism in general and of form-based code in particular as a tool of the New Urbanism. It may be true that form-based code offers more flexibility than traditional zoning schemes and thus may offer some respite from acknowledged ills such as social and racial divisions created by exclusionary zoning and other tools, and from the relative inutility of single or limited use districts. However, I will argue that these benefits are eclipsed by some of the problems of form based code. Form-based code is frequently hailed as a “back to the future” approach to both urban and suburban living which will cure numerous

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ills such as the physical decay, racial segregation, and economic downturns that are endemic to many United States cities and towns, but it may not be an effective means of addressing the decline of civic life. This is first because form-based code, in advocating for norms to re-create the city of the past, seeks to implement by design what was essentially a spontaneous and self-generated form of social organization driven largely by economic concerns rather than social or political concerns. Next, Urbanism, which is purportedly at the heart of New Urbanist planning schemes such as form-based code, is itself a contested notion, subject to many alternate visions of the city of the past. As a result, the implementation of form-based code premised on New Urbanism may lead to an ersatz Urbanism. Finally, and perhaps most salient among the critiques I present, form-based code's reliance upon the "community" to formulate design standards through the charrette process has the potential to further isolate those who are already disadvantaged.

I. Introduction

Since the 1980s the notion of "New Urbanism" has taken hold as a theory for designing and redesigning towns and cities in the United States and elsewhere. New Urbanism argues for a return to the "traditional" pattern of cities, one that is characterized by mixed uses in densely populated neighborhoods that are pedestrian friendly and offer easy access to workplaces, shopping, and recreation all while maintaining a fixed and widely shared aesthetic sensibility.¹

This eclectic intermingling, it is argued, results in both economic and social vitality. The New Urbanism grows from Urbanism, a movement first seen in the 1920s and 1930s which sought to offer a systematic account of human settlement in dense "urban" living and commercial spaces as opposed to rural, suburban, or exurban areas.² Proponents of New Urbanism believe that this is because the vital mix that defined the cities of old is no longer in

¹ For a discussion of some of the explicit goals of New Urbanism, see Rutherford H. Platt, *Land Use and Society: Geography, Law, and Public Policy* 273-274 (2004).

² See, e.g., Lewis Mumford, *The City in History: Its Origins, Its Transformations, and Its Prospects* 2-10 (1968 Harvest Books) (1961). In his book Mumford seeks to return to the beginnings of the city and calls for an "organic" city in which technological innovation should not take precedence over the essential humanness of civilization: "... We need a new image of order, which shall include the organic and personal , and eventually embrace all the offices and functions of man." *Id.* at 4

place as a result of the implementation of Euclidean zoning schemes. In the case of newer towns, those founded purely on Euclidean principles of separation of use, New Urbanists assert that the vital mix was never there in the first place and that thus such places exist as soulless shells.³ The New Urbanist remedy for this municipal malaise is to put into place the elements deemed crucial for maintaining a thriving civic life.⁴ One recently developed mechanism for achieving the goals of New Urbanism is form-based code.⁵

Form-based code, known in its various incarnations as design-based zoning, community-based urban design, context-based design, smart growth code, or communicative action-based planning,⁶ is a land use regulatory and planning tool which is increasingly used to achieve the goals of New Urbanism in municipalities of various types, sizes, and locales.⁷ In turn, New Urbanism is founded on a core of Urbanism. Urbanism offered a distinct body of mechanisms for normative ordering in the civic environment which, in its earliest incarnations, was not

³ Jane Jacobs, *Great American Cities* 7 (1961). Jacobs, in referring to attempts at urbanization, writes of the “freshly-minted decadence of the new unurban urbanization.” *Id.* Such modern municipalities are further exemplified by monotony, sterility, and vulgarity. *Id.*

⁴ See, e.g. Patsy Healey, *The Communicative Turn in Planning Theory and Its Implications for Spatial Strategy Formation*, in *Readings in Planning Theory* 237 (Scott Campbell ed., 2002).

⁵ *Id.*

⁶ *Id.*

⁷ Some cities and towns that have recently adopted some aspects of form-based code as part of the zoning process include Syracuse, New York; Palo Alto, California; Arlington, Virginia; Petaluma, California; Huntersville, North Carolina; Louisville, Kentucky; and Emmaus, Pennsylvania. Many more are either considering adopting form-based codes or in the process of drafting such codes. See e.g. Jason Miller, *Smart Codes, Smart Places* National Association of Realtors Magazine Summer 2004, Available at <http://www.realtor.org/SG3.nsf/pages/summer04sm?OpenDocument>.

connected to government.⁸ Instead, the cities of old often spontaneously developed, with the buildings, streets, and neighborhoods themselves forming a type of “law.”⁹ Because creating the amenities necessary to implementing New Urbanism often requires substantial changes to infrastructure, form-based code is more frequently utilized in the design of new towns and undeveloped sections of towns and cities, or in efforts to infill or retrofit land in existing urban areas. Form-based code, however, unlike the Euclidean zoning¹⁰ codes that are at the base of most zoning and planning schemes in United States cities and towns,¹¹ focuses not on land use but on the character of development. Instead of attempting to segregate uses across

⁸ Sally Falk Moore, Legal Systems of the World: An Introductory Guide to Classifications, Typological Interpretations and Bibliographical Resources, in Law and the Social Sciences 11,15 (Leon Lipson & Stanton Wheeler eds., 1986).

⁹ According to Jacobs, the diversity was generated by the existence of certain design features which in effect generate “law”—the street, the neighborhood, the district, and ultimately the city are organs of self-government in the successful city. Jacobs, Great American Cities 117-122 (1961).

¹⁰ Euclidean zoning refers to the segregation of land uses into specified geographic districts and dimensional standards. This form of zoning was upheld by the United States Supreme Court in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). I address Euclid in further below *infra* at n. 49.

¹¹ Some municipalities implement performance zoning instead of or in addition to Euclidean zoning. Frederick W. Acker, Performance Zoning, 67 Notre Dame L. Rev. 363, 364 (1991). Performance zoning employs performance-based or goal-oriented criteria to establish review parameters for proposed development projects in any area of a municipality, such as how a particular project impacts adjacent lands and public facilities. *Id.* at 369. In its most unadulterated form, performance zoning allows for the broadest range of uses and creates a uniform system of performance standards throughout a particular municipality. *Id.* Other municipalities include incentive based zoning as a supplement to Euclidean zoning. See Jerold S. Kayden, The 1991 Bellagio Conference On U.S.-U.S.S.R. Environmental Protection Institution: Market-Based Regulatory Approaches: A Comparative Discussion Of Environmental And Land Use Techniques In The United States, 19 B.C. Env'tl. Aff. L. Rev. 565, 568-569 (1992). Incentive zoning is closely related to performance zoning, but is a system by which zoning incentives are provided to developers on the condition that specific physical, social, or cultural benefits are provided to the community. *Id.*

neighborhoods or entire towns, form-based codes look to the scale, shape, scope and specific details of a particular development project.

Also unlike Euclidean zoning codes, form-based codes are most often prescriptive rather than proscriptive or descriptive. Hence, form-based codes tell developers what they can and should build in fine detail rather than telling them what they cannot build or describing generally permitted uses. Because of the level of detail in such codes and the potential curtailment of rights that such codes may mean for property owners, a crucial aspect of the adoption of form-based code is community involvement. This involvement is carried out via the “charrette” process, a series of meetings at which community members and other interested parties are invited to voice their desires for a particular type of project.¹²

¹² Charrette (sometimes spelled “charette”) is an architectural term that refers to a collective workshop process undertaken by designers and planners to reach consensus on the design of a particular project and to sketch out the project’s preliminary form. See Nat’l Charrette Inst., What Is a Charrette?, <http://www.charretteinstitute.org/charrette.html> (last visited November 13, 2006). The charrette has been increasingly used to encourage participation in urban development schemes and has been, states on commentator, a very deliberate part of the federal governments decentralization scheme in federally-sponsored urban development. Audrey G. McFarlane, When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development, 66 Brooklyn L. Rev. 861, 863 (2000). In the context of form-based code, the charrette usually involves lay members of a community interested in or affected by a project as well as design and planning professionals. Benjamin E. Northrup & Benjamin J. Bruxvoort Lipscomb, Country and City: The Common Vision of Agrarians and New Urbanists, in *The Essential Agrarian Reader: The Future of Culture, Community, and the Land* 191, 198-199 (Norman Wirzba ed., 2004). It is said to have been conceived in the development of Seaside, Florida, one of the first acknowledged New Urban communities. *Id.* For a general discussion of the charrette in form-based code processes see Charles J. Kibert, Construction Ecology 238-239 (2002); Kenneth Hall & Gerald Porterfield, Community by Design: New Urbanism for Suburbs and Small Communities 51 (2000). See also Thomas L. Daniels, Holding Our Ground: Protecting America’s Farms and Farmland 40 (1997).

This Essay serves as a critique of the New Urbanism in general and of form-based code in particular as a tool of the New Urbanism. It may be true that form-based code offers more flexibility than traditional zoning schemes and thus may offer some respite from acknowledged ills such as social and racial divisions created by exclusionary zoning and other tools, and from the relative inutility of single or limited use districts. However, I will argue that these benefits are eclipsed by some of the problems of form based code. Form-based code is frequently hailed as a “back to the future” approach to both urban and suburban living which will cure numerous ills such as the physical decay, racial segregation, and economic downturns that are endemic to many United States cities and towns, but it may not be an effective means of addressing the decline of civic life. I identify three reasons for this.

First, form-based code, in advocating for norms to re-create the city of the past, seeks to implement by design what was essentially a spontaneous and self-generated form of social organization driven largely by economic concerns rather than social or political concerns. Next, Urbanism, which is purportedly at the heart of New Urbanist planning schemes such as form-based code, is itself a contested notion, subject to many alternate visions of the city of the past. As a result, the implementation of form-based code premised on New Urbanism may lead to an ersatz Urbanism. Finally, and perhaps most salient among the critiques I present, form-based code’s reliance upon the “community” to formulate design standards through the charrette process has the potential to further isolate those who are already disadvantaged. While form based code is not intended as a tool to forward political interests in and of itself, in the context of urban planning the charrette may easily be transformed into a mechanism of “responsibilitization”—the politically inspired move away from formal systems and the thrust of

autonomy on those who previously lacked such autonomy. This may result in further isolating the most disadvantaged residents of towns and cities.

In order to illustrate the critiques I raise, I first consider the historic evolution from traditional land use planning schemes to zoning and planning and form-based code systems, and discuss some of the reasons for the evolution in land use planning devices. Next, I will discuss form-based code and the communal charrette process which is central to it. Finally, I illustrate my critique of communal planning with reference to a recent paradigm: the attempt to implement form based code principles in the rebuilding of New Orleans in the aftermath of Hurricane Katrina.

II. The Antecedents of United States Zoning and Urban Planning and the Rise of Form-Based Code

Traditional zoning schemes are land use regulatory tools which typically prescribe designated land uses within a community with an ultimate goal of restraining density and separating primary uses.¹³ Zoning is one of several legal devices for implementing the proposals and objectives for land development as outlined in a city's comprehensive plan, which is its statement of the city's goals, objectives, principles, guidelines, policies, standards, and strategies for the growth and development of the community. Notwithstanding its ubiquity as a tool of planners, zoning is, within the scope of Anglo-American law and urban planning theory,

¹³ Jay Wickersham, *Jane Jacobs's Critique of Zoning: From Euclid to Portland and Beyond*, 28 B.C. Envtl. Aff. L. Rev. 547, 553 (2001).

relatively new, having been first articulated near the end of the nineteenth century.¹⁴ Well before zoning arose as a planning tool, American cities were developed in response to market rather than social forces, and mechanisms for development were typically found in private law solutions. Zoning followed these private land use arrangements, and in the late twentieth century, with the bloom well off the rose of zoning, there arose New Urbanist devices such as form based code.

A. The Economic Impetus of City Formation

Until the late nineteenth century, much of the population of the United States lived outside of the cities in relatively low density rural areas. Only five United States cities, New York, Philadelphia, Baltimore, Boston, and Charleston, had populations over 20,000, and these cities developed around ports that supported commerce.¹⁵ Most of the persons living in early American cities were associated in some respect to the manufacture, marketing, and distribution of goods which were the *raison d'être* of the cities.¹⁶ As one commentator has observed, urbanization was structured around an ideological and cultural paradigm called “privatism,” where the focus was on the accretion of individual wealth.¹⁷ United States cities were created, organized, and to a great extent defined, not as communities of social or political participation, but as a “fusion of money-

¹⁴ For a general discussion of the roots of planning, see Jon A. Peterson, *The Birth of City Planning in the United States, 1840-1917* 1-28 (2003).

¹⁵ Alexander von Hoffman & John Felkner, Joint Center For Housing Studies, Harvard University No. W02-1, *The Historical Origins and Causes of Urban Decentralization in the United States* 4 (Cambridge, Massachusetts 2002), available at http://www.jchs.harvard.edu/publications/communitydevelopment/von_hoffman_w02-1.pdf.

¹⁶ *Id.*

¹⁷ Timothy J. Gilfoyle, *Urbanization*, in *A Companion to 19th-Century America* 152, 156 (William L. Barney ed., 2001).

making, accumulating citizens.”¹⁸ This meant that much of the land in urban and near-urban areas in the United States was owned or controlled by either an “old money” elite or by wealthy tradesmen and shopkeepers.¹⁹ These persons occupied the most usable, desirable, and ultimately most expensive land at the center of cities.²⁰ Poorer persons who managed to live in the city occupied side alleys and less desirable lowlands or thoroughfares at the sufferance of the wealthy.²¹ Because making improvements to the built environment was often considered a private concern, the poor had little voice in the development of the cityscape and received few of the benefits of such development.²² For example, in much of nineteenth century Chicago, physical improvements were the responsibility of individual property owners, and thus landless citizens were often without amenities such as sidewalks and sewers.²³ There were no fixed, clearly articulated standards of development but rather ad hoc solutions achieved via private arrangements among land owners.

B. Private Land Use Agreements as Planning Devices

Members of the urban land owning classes frequently relied in the first instance upon the implicit understandings of their class regarding land use standards.²⁴ If these informal agreements failed, they also had access to the formal legal tools that had long been a part of

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See Priscilla Ferguson Clement, *Welfare and the Poor in the 19th Century City: Philadelphia 1800 to 1854* 24-25 (1985).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

Anglo-American jurisprudence: express private agreements and nuisance law to police land use. Private land use agreements typically contained prescriptions on actions related to land or placed affirmative duties upon the parties in relation to their control or ownership of land, and were usually seen in the form of easements or covenants which could be invoked in the event of a breach.²⁵ Nuisance law generally allowed persons to address harmful actions by neighbors or others which were not covered by pre-existing agreements.²⁶ These traditional land use control mechanisms had significant limits, however, which became all too obvious in the dawn of the twentieth century.

First, private land use agreements were not always in place before a problem arose and hence could not be called upon to resolve such problems. Next, even though using nuisance law required no prior agreement between the parties, there were some land uses which, while objectionable to others, did not meet the traditional standard for nuisance.²⁷ A nuisance occurs when one landowner uses her land so as to unreasonably interfere with another landowner's use and enjoyment of her land.²⁸ The key is reasonableness, which varies from case to case and is highly fact-specific. Uses that merely offend the aesthetic sensibilities of one party are not necessarily nuisances, a limitation which often substantially reduced the potency of the nuisance

²⁵ Michael D. Bayles, *Principles of Law: A Normative Analysis* 111-113 (1987).

²⁶ William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth Century America* 61-62 (1996); *see also* Bayles, *supra* note 25, at 235-236.

²⁷ *See e.g.*, Jesse Dukeminier & James E. Krier, *Property* 951-952 (2002) citing Elmer S. Forbes, *Rural and Suburban Housing*, in *Proceedings of the Second National Conference on Housing* (1912) (discussing the harms caused by the locating of Chinese laundries, garages, and other unpleasantness near the expensive homes of wealthy landowners).

²⁸ Bayles, *supra* note 25, at 235-236.

doctrine. This was of particular concern to the traditional landed classes since, in the period near the turn of the nineteenth century, many social codes that often kept the urban poor and working classes well away from the rich were broken. This meant that some wealthy landowners were confronted with behaviors by nearby landowners that, while possibly annoying or even offensive to certain personal or community norms, were not actionable.

Next, in the large cities with industrial or commercial concerns in close proximity to carriage trade areas or exclusive residential areas, the annoyances sometimes arose not from nearby landowners but from those whose proximity allowed them to simply pass by. For example, merchants on New York's Fifth Avenue decried the possibility that the immigrant masses employed in nearby businesses could walk on the streets at lunchtime, destroying the exclusive character of their businesses, and in the view of the merchants, reducing property values accordingly.²⁹ Nuisance law could offer no remedy for such problems. In addition, because nuisance is a post hoc remedy and can only be invoked after a problem arises, and because it is highly fact specific, it was difficult for landowners to predict when or if their own actions would be the subject of nuisance claims.³⁰ This uncertainty left landowners who sought to put their land to new or different uses facing the possibility that the projects in which they invested could be halted by the application of nuisance law.

Finally, besides these limits of private land use arrangements, by the early twentieth century, notions of the permanence of social class, the concentration and retention of wealth in a

²⁹ Peter Hall, *Cities of Tomorrow* 61 (2002).

³⁰ Dukeminier *supra* note 27, at 952.

relative few, and social exclusivity, gave way, if not factually then ideologically, to broad notions of equality not only in social relations but in legal relations.³¹ This was especially true as it concerned land ownership and use. The firmly fixed but invisible geographic boundaries and land use norms that had for generations divided rich from poor and immigrant strivers from old money aristocrats and wealthy merchants were quickly dissolving in the stew of modern urban life. These limits to traditional law, combined with the widespread socioeconomic transformation seen at the beginning of the twentieth century meant that a new mechanism was required to control land use. This new mechanism was zoning. New York is generally said to have had the first city-wide zoning code, adopted in 1916.³² A number of cities soon followed suit, and much of the zoning enabling legislation originally adopted prior to 1924 was based on the New York general city enabling act.³³

C. The Rise of Zoning Codes

Zoning codes were in many cases meant to counter the ills of the urban environment in the United States which arose from the Second Industrial Revolution, dating from roughly 1850 until the beginning of the nineteenth century.³⁴ This period was heralded by unprecedented

³¹ This transition from status bound relations to greater personal legal autonomy for the individual is perhaps most famously summed up by English jurist Henry Sumner Maine who in 1861 described this process as the move from status to contract. John R. Sutton, *Law/Society: Origins, Interactions, and Change* 26-31 (2001). Sutton also reflects upon the work of Emile Durkheim, Auguste Comte, Ferdinand Tonnies, and other middle and late nineteenth century social and legal theorists who considered the effects of urbanization and modernization on social and legal relations. *Id.* at 31-34.

³² John Barry Cullingworth, *The Political Culture of Planning: American Land Use Planning in Comparative Perspective* 16 (1993).

³³ *Id.* at 27.

³⁴ See e.g. Stephanie B. Kelly, *Community Planning: How To Solve Urban Environmental Problems* 68 (2004); see also Paul Wheeler, *An Architectural Perspective on the Future of the*

innovation, technological advances, and notions of limitless abundance.³⁵ It was also characterized by previously unseen levels of pollution and other environmental degradation.³⁶ This was, moreover, a time of seismic socioeconomic change, vastly altered mores, and an associated anomie, all of which caused the period to be described by various commentators as both the beginning of and the beginning of the end of the “American” way of life.³⁷ This vast schism in the perceptions of early twentieth century life grew largely from the growth in social mobility that accompanied the changes of this period.³⁸ While social mobility was arguably one of the hallmarks of life in the United States because it resulted in a broadening of the middle class and the rise of a new wealthy class, social mobility was at the same time the bane of many members of the long established landed upper classes. Explicit, legislated urban planning was a means of mediating the burgeoning class conflict in American cities.³⁹ Because some of the world’s older cities had already begun to confront this challenge, many looked to Europe for answers and especially to the land use mechanism being developed in parts of England which came to be known as the Garden Cities movement.

Workplace, in *Building the Knowledge Economy: Issues, Applications, Case Studies* 1131 (Paul Cunningham et al. eds., 2003).

³⁵ Thomas C. Shevory, *Body/Politics: Studies in Reproduction, Production, and (Re)Construction* 24 (2000).

³⁶ Kelly, *supra* at note 34.

³⁷ Barry W. Johnson & Martha Briton Eller, *Federal Taxation of Inheritance and Wealth Transfers*, in *Inheritance and Wealth in America* 66 (Robert Keith Miller & Stephen J. McNamee eds., 1998).

³⁸ *Id.*

³⁹ *Id.*

The Garden Cities movement, developed by English social reformer Ebenezer Howard, is said to have served as the ideological roots of planning and ultimately of zoning.⁴⁰ Howard developed his proposals to improve the lives of London inhabitants, advocating for a resettling of some of London's inhabitants into small, new towns in the countryside where they could avoid the harsh, crowded conditions of the large city. These new cities were characterized by an effusion of single family houses, surrounded by gardens. Howard's idea had several unique aspects. First, it called for a strict segregation of uses and a permanent belt of open land which would limit the growth of the new city.⁴¹ It dispensed with private ownership and called for municipal ownership of the entire tract, which would then be distributed via leaseholds to inhabitants.⁴² It further called for limits on population, the development of industries able to support the population, and made provision for the founding of new communities as original garden cities became fully inhabited.⁴³

A number affluent, influential, and socially conscious Americans helped to bring Howard's ideas to the attention of American city planners. Many of these the planners adopted some of Howard's ideas in their efforts to design the new city of the twentieth century.⁴⁴ One result was the creation of the City Beautiful movement, premised on the notion that civic

⁴⁰ See generally Ebenezer Howard, *Garden Cities of Tomorrow* (F.J. Osborn ed., M.I.T. Press 1965; originally published in 1902 as *Garden Cities of Tomorrow*; first published in 1898 as *Tomorrow: A Peaceful Path to Real Reform*).

⁴¹ Lewis Mumford, Introduction: The Garden City Idea and Modern Planning, *in* Howard, *supra* note 40, at 29, 34.

⁴² *Id.* at 35

⁴³ *Id.*

⁴⁴ Peterson, *supra* note 14, at 232.

revitalization, and ultimately social progress, could be achieved by beautification and sanitation regimes with attention to landscape design, municipal improvement and civic configuration, also captured some of Howard's ideas.⁴⁵ The most noteworthy of Howard's ideas to be embraced by American civic planners, which was also in many ways the culmination of the City Beautiful movement, was the adoption of segregated uses and the preference for single family homes.⁴⁶ Inspired by Howard's ideas, and in response to concerns with building uniformity, public health, safety and welfare, starting in the late 1800s in the United States, cities and towns began to develop zoning codes.⁴⁷ Zoning has been hailed as the single most important innovation promoted by American planners in the years prior to World War I.⁴⁸ In 1926, the legality of zoning was established in *Village of Euclid v. Ambler Realty*.⁴⁹

In *Euclid*, Ambler Realty Company, which owned land in the Village of Euclid, Ohio, situated just outside of Cleveland, Ohio, sought to enjoin the Village of Euclid from enforcing a comprehensive zoning ordinance. Euclid's zoning ordinance rendered one portion of Ambler's tract useable for only single or two family homes, another portion for single or two family homes

⁴⁵ William H. Wilson, *The Ideology, Aesthetics and Politics of the City Beautiful Movement*, in *The Rise of Modern Urban Planning, 1800-1914* 165, 166 (Anthony Sutcliffe ed., 1980).

⁴⁶ Peterson *supra* note 14, at 308.

⁴⁷ *Id.* at 308-309.

⁴⁸ *Id.* at 308

⁴⁹ 272 U.S. 365 (1926). For a broad discussion of the *Euclid* case and of Euclidean zoning in general, see Richard Chused, *Symposium On The Seventy-Fifth Anniversary Of Village Of Euclid v. Ambler Realty Co.: Euclid's Historical Imagery*, 51 Case W. Res. 597 (2001).

and limited auxiliary uses,⁵⁰ and only a third portion open to a broad number of residential, commercial, and industrial uses.⁵¹ Ambler alleged that it had held the land for a number of years for the purposes of developing it as industrial land, and that if put to industrial use the land would be worth four times as much than if it was zoned residential.⁵² Thus, Ambler argued, the zoning constituted an unconstitutional taking under the Fourteenth Amendment of the United States Constitution.⁵³

At the trial court, the United States District Court for the Northern District of Ohio held that the ordinance was unconstitutional and void, and enjoined its enforcement.⁵⁴ Euclid sought review. The United States Supreme Court upheld the zoning as based on the Village's inherent police power.⁵⁵ While the Court found that the exact line between the legitimate and illegitimate use of the police power could not be clearly delineated as it varies with facts and circumstances, the Court nonetheless held that zoning can be based on more than the narrow prevention of common law nuisance.⁵⁶ The Court held that before a zoning ordinance can be declared unconstitutional, the provisions must be clearly arbitrary and unreasonable, having no substantial

⁵⁰ Euclid at 380-381. Permitted auxiliary uses included churches, schools, cultural, and recreational use.

⁵¹ *Id.*

⁵² *Id.* at 384-385.

⁵³ *Id.* at 385.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Euclid at 388 citing *Welch v. Swasey*, 214 U.S. 91 (1909); *Hadachek v. Los Angeles*, 239 U.S. 394 (1915); *Reinman v. Little Rock*, 237 U.S. 171 (1915); *Cusack v. City of Chicago* 242 U.S. 525, 529-530 (1917). Before Euclid, cases had supported the municipal use of the police power to prohibit uses which could cause nuisances.

relationship to the public health, safety, morals, or general welfare. *Euclid* settled the constitutionality of comprehensive zoning. Since *Euclid*, zoning ordinances bear the presumption of validity. When they are subject to challenge, it is only under the rational basis standard. In the aftermath of *Euclid*, legislated land use via zoning quickly became the norm in United States towns and cities.

While zoning was not meant to supplant private land use arrangements, in many instances it did just that, offering broad, legislatively created standards which were often used in lieu of and not in addition to private land use arrangements. It was ostensibly a collectivist approach to the system of land use planning whereby some of the “sticks,” or parts of the sticks, in the famed “bundle of sticks” metaphor of property rights are transferred to a municipal entity for reallocation to the entire community.⁵⁷ However, zoning represents contradictory norms and impulses, as it may be viewed at once as elitist and embracing a communitarian ethic. This is because zoning’s preference for separation of uses, particularly dividing residential from commercial or industrial, and low density residential uses from high density uses made it a versatile tool for enshrining race-based privilege and perpetuating disadvantage.⁵⁸

Indeed, in the earliest days of zoning, communities often implemented blatantly racist zoning schemes, the first of which was seen in Baltimore, Maryland in 1910 in an ordinance

⁵⁷ One observer describes zoning’s effect on the common law bundle of sticks as being akin to a set of quivers that constrain the sticks. John G. Francis & Chuck Easttom, *Land Wars: The Politics of Property and Community* 113 (2003). Yet another commentator conceived of the bundle as consisting of green sticks and red sticks as part of a traffic signal metaphor, with green sticks representing rights or “go”, and red sticks signifying “stop” or duties. Rutherford H. Platt, *Land Use and Society: Geography, Law, and Public Policy* 93-100 (1996).

⁵⁸ Jane M. Jacobs & Ruth Fincher, *Cities of Difference* 52 (1998).

which zoned for all white or all black blocks.⁵⁹ A number of American cities followed suit.⁶⁰ Though there were a number of challenges to the practice, these challenges met with mixed success.⁶¹ Finally, the practice of explicitly racial zoning was struck down in *Buchanan v. Warley*,⁶² wherein the United States Supreme Court held that a Louisville, Kentucky ordinance requiring residential segregation based on race violated the Fourteenth Amendment of the United States Constitution. Unlike prior state court rulings that had overturned racial zoning ordinances on takings clause grounds due to those ordinances' failures to grandfather land owned prior to enactment, the Court in *Buchanan* ruled that the motive of the Louisville ordinance, race, was an insufficient purpose to make the law constitutional.⁶³ In the aftermath of *Buchanan*, however, cities often sought to create legally defensible racial zoning ordinances.⁶⁴

In recent decades, as obvious displays of racial bias have become not only illegal but socially unacceptable, traditional zoning schemes have eschewed explicit racial references. Nonetheless, modern zoning schemes still frequently served as tools of social exclusion. This is especially true when implemented in newer towns and suburbs where they have the effect of excluding persons based on socioeconomic status with requirements such as minimum lot sizes

⁵⁹ Christopher Silver, The Racial Origins of Zoning in American Cities, in *Urban Planning and the African American Community* 23, 27 (June Manning Thomas & Marsha Ritzdorf eds., 1997).

⁶⁰ Racial zoning was seen throughout the South in cities such as in Richmond, Virginia, Charlotte, North Carolina and Atlanta, Georgia. It was also implemented in Northern cities such as Chicago, Illinois and in the far West in some California cities. *Id.* at 25-28.

⁶¹ Some state court rulings overturned racial zoning ordinances on takings clause grounds due to those ordinances' failures to grandfather land owned prior to enactment.

⁶² 245 U.S. 60 (1917).

⁶³ *Id.* at 82.

⁶⁴ Silver, *supra* at 32.

which have the effect of increasing the cost of housing so that it is beyond the means of lower-income households.⁶⁵

In the years since the widespread adoption of zoning as the principal tool of city planners, there has been a sea change in the challenges facing the American city. First, in a number of older American cities in the Northeast and Midwest, a significant problem is growing depopulation rather than overcrowding.⁶⁶ Next, many cities, rather than remaining centers for capital production and accumulation, have become post-industrial specters of their former selves, often largely populated by members of racial and ethnic minority groups employed in low-wage

⁶⁵ See *e.g.* S. Burlington County NAACP v. Mount Laurel, 336 A.2d 713 (N.J. 1975) (hereinafter Mt. Laurel I); S. Burlington County NAACP v. Mount Laurel, 456 A.2d 390 (N.J. 1983) (hereinafter Mt. Laurel II). In Mt. Laurel I, the New Jersey Supreme Court ruled that municipalities had a constitutional obligation to provide a "fair share" of low- and moderate-income housing. The decision responded to a variety of zoning practices in rural and suburban communities that were designed to exclude affordable housing from these areas. The court found that exclusionary zoning went against the communities' obligations to provide for the welfare of not only the town but the general region. In Mt. Laurel II, the New Jersey Supreme Court discussed the fact that municipalities were failing to address the sorts of exclusionary zoning practices which had been the basis of Mt. Laurel I. Hence, the New Jersey Supreme Court reaffirmed the principles of the earlier decision and required municipalities to implement a variety of "affirmative" governmental mechanisms. One of the most noteworthy aspects of the decision was the Court's provision of a "builder's remedy," which allowed builders or landowners who wanted to provide low- and moderate-income housing in a jurisdiction to sue a municipality to obtain approval notwithstanding existing zoning standards for an area.

⁶⁶ See M. Christine Boyer, *Dreaming the Rational City: The Myth of American City Planning* 237 (1986). The "rust belt" phenomenon, the deindustrialization, decay and depopulation of older United States cities has been produced by a number of factors, among them the loss of manufacturing jobs and their partial replacement by knowledge-intensive white collar jobs often requiring post-secondary education. John D. Kasarda, *Cities as Places Where People Live and Work: Urban Change and Neighborhood Distress*, in *Interwoven Destinies: Cities and the Nation* 81, 83 (Henry Cisneros ed., 1993). This has meant that already present poorly educated inner city residents were excluded from employment. *Id.* The decline of these Northeastern and Midwestern cities has, however, to a great extent been paralleled by the almost exponential growth of "sun belt" cities in the South and Southwest. Eli Ginzberg, *The Changing Urban Scene: 1960-1990 and Beyond*, in *Interwoven Destinies: Cities and the Nation* 31, 35-37 (Henry Cisneros ed., 1993).

clerical, retail or nonunionized manufacturing or altogether unemployed.⁶⁷ In many of America's oldest cities, thriving middle-class communities of the early and mid-twentieth century have given way to an ever-burgeoning group of have-nots. In an effort to diagnose and treat the malady of the declining American urban area, New Urbanist planners have increasingly turned to the pre-zoning city of the past as a model. Form-based code is one mechanism for this look backward.

D. Form-based Code as New Urbanist Tool

Form-based code is part of a broader movement in planning theory which focuses on “communication, collaboration, mediation and diversity.”⁶⁸ Indeed, in recent years the use of words such as “radical”⁶⁹ or “insurgent”⁷⁰ in association with planning schemes has signaled a fundamental alteration in the way that planning functions are carried out. Governmental authorities will no longer exercise an exclusive monopoly over the process;⁷¹ rather, the idea is

⁶⁷ Boyer *supra* at 271. Consider the example of Cleveland, Ohio, which was once hailed as one of the wealthiest cities in the United States. See e.g. Herbert Harwood, *Invisible Giants: The Empires of Cleveland's Van Sweringen Brothers* 1 (2003). Cleveland was the birthplace and longtime home to John D. Rockefeller, Sr., the founder of the Rockefeller empire. See generally Ron Chernow, *Titan: The Life of John D. Rockefeller, Sr.* (1998). Despite this glorious past, Cleveland was ranked the poorest city in the United States in 2004 and again in 2006. See Diane and Galnincea Suchetka, Barbara, *Cleveland: Poorest Big City in the U.S.*, *The Plain Dealer*, August 30, 2006; Robert L. Smith & Dave Davis, *Cleveland No.1 in Big-City Poverty*, *Sports Final Edition*, National A1 (2004).

⁶⁸ John Friedmann, *The Prospect of Cities* 101 (2002).

⁶⁹ See e.g. John Friedmann, *Planning in the Public Domain: From Knowledge to Action* 412 (1987).

⁷⁰ Leonie Sandercock, *Cosmopolis II: Mongrel Cities in the Twenty-First Century* 47 (2003).

⁷¹ Friedmann, *The Prospect of Cities* *supra* note 68, at 101.

to include a broad cross-section of the populace at the ground level.⁷² These ideas have been propagated by a number of planning experts.⁷³ Though form-based code is seen in various iterations in United States municipalities, it is typified by the presence of most or all of the following fixed characteristics: a controlling regulating plan, a framework of urban regulations, regulations defining streets and related passageways, landscape regulations, and finally architectural regulations.⁷⁴ Perhaps the most defining features of form-based code are its design-based rather than use-based standard for development and its reliance on the community in conjunction with city officials and planning professionals to articulate the nature of the design.⁷⁵ This means that the characteristics which define a form-based code regime are often presented as “empty boxes” to be filled at the discretion of the multiple actors involved in reaching consensus. Form-based code, with its attention to detail on the most local level, appears to be the ultimate tool of the New Urbanism movement. New Urbanism, however, is a movement which is itself subject to critique because of its uncertain foundations and unsubstantiated claims.

New Urbanism, while seemingly a single strand of American planning founded upon assertions about the nature and scope of “traditional” American Urbanism, is actually a compilation of multiple viewpoints and approaches to civic planning.⁷⁶ New Urbanism

⁷² *Id.*

⁷³ See e.g. Sandercock, *supra* note 70.

⁷⁴ Robert J. Sitkowski & Ohm. Brian W., Formed Based Land Development Regulations, *The Urban Lawyer*, Winter 2006, at 163.

⁷⁵ Kenneth Hall & Gerald Porterfield, *Community by Design: New Urbanism for Suburbs and Small Communities* 51 (2000).

⁷⁶ Emily Talen, *New Urbanism and American Planning: The Conflict of Cultures* 4-5 (2005).

represents an effort to create a fuller and more nuanced framework for urban living.⁷⁷ This has often meant calls for a return to the United States cities and towns of the pre-zoning nineteenth century, where, for example, much of the population lived in or around a defined center in densely built enclaves. Walking was one of the principal means of transportation, and most jobs were within city limits. These burghs, we are given to understand, were exemplary in both form and function. New Urbanism mediates for a return to this traditional way of living by implementing zoning and planning norms that will create or recreate such communities. Though sometimes known by other names such as Neotraditional Planning, Traditional Neighborhood Development, Transit-based Development, and even New Suburbanism, in every incarnation New Urbanism extols the virtues of the cities and towns of former times.⁷⁸ There are numerous critiques of Urbanism which have been launched in the years since the inception of the movement.⁷⁹ Three of these critiques are particularly salient. First, it is not clear that there is a single type of traditional Urbanism. Next, traditional urban form was for the most part serendipitous, arising more in response to the economic needs, geographic positioning and demographic characteristics of the particular urban locale. Finally, it is not clear that the New Urbanist vision adequately addresses the way that people want to live now.

1. Multiple Strands of Urbanism

There is perhaps no single variety of “traditional” Urbanism back to which the New Urbanism may hearken. Urbanism has, according to one scholar, suffered a continual crisis of

⁷⁷ *Id.*

⁷⁸ J. Barry Cullingworth & Roger Caves, *Planning in the USA: Policies, Issues, and Processes* 138 (2003).

⁷⁹ See Talen *infra* note 76.

definition.⁸⁰ Most would agree that the broad concept of Urbanism described life in the city environment as opposed to suburban or rural life. But there the consensus ends. It has been argued that Urbanism, rather than being descriptive of one movement, is really an amalgam of multiple and sometimes competing “cultures.”⁸¹ One of these cultures calls for attention to the built environment on a micro scale, focusing, for example, on particular recreational spaces or educational facilities.⁸² Another form of Urbanism looked to macro-developmental approaches for the creation and maintenance of the urban environment, with attention to broad land use norms or on large-scale local and regional transit systems.⁸³ Some views on Urbanism have actually been *exurban* in view, looking to the areas beyond the city as the ultimate in desirable human habitats.⁸⁴ Finally, some types of Urbanism have been more ecologically focused, and have looked to ways to reconcile the built environment with the natural environment.⁸⁵

To recognize the existence of competing impulses ever-present in the Urbanism movement, which sometimes threatened to undermine the very reason for such a movement, one need only consider that the great names in urban planning, such as Ebenezer Howard, Frank Lloyd Wright, and Le Corbusier, were themselves staunchly opposed to the cities of their times.

⁸⁰ Talen, *supra* note 76, at 1.

⁸¹ Emily Talen describes the “connections and conflicts” between what she sees as the various approaches to urbanism in the United States as “cultures. Talen, *supra* note 76, at 2.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

All three envisioned urban utopias that would constitute radical reconstructions of the city so as to eliminate features that they believed to be baneful, such as high density and mixed uses.⁸⁶

Yet, these very features are now extolled as virtues of the “traditional” urban environment and the goal of most New Urbanist planning.

2. Accidental Urbanism

Even where specific notions of traditional Urbanism can be articulated as the basis of a distinct New Urbanism, it is important to recognize that regardless of form, traditional Urbanism, was, for the most part, accidental. The irony of New Urbanism is that it trades on the accidental development of the past and attempts to make it manifest via an explicit, highly stylized planning scheme such as form-based code. With New Urbanism, as with some of the urban utopia movements of the late nineteenth and early twentieth centuries, the past is appropriated to legitimate the roots of what was and is a very new endeavor. New Urbanism seeks to rationalize a desire for that which was never necessarily intended to exist in any particular form.⁸⁷ So-called best practices in urban planning and urban living are often based on revisionist high points of the past which glide over flaws in order to sustain the myth of our ideal urban past.⁸⁸ Perhaps most damning to the goal of reinstating the urban past is that it is none too clear that this represents the way that people in current cities want to live.

⁸⁶ Robert Fishman, *Urban Utopias in the Twentieth Century: Ebenezer Howard, Frank Lloyd Wright, Le Corbusier* 3-4 (1982).

⁸⁷ Robert Freestone, *Learning From Planning's Histories*, in *Urban Planning in a Changing World: The Twentieth Century Experience* 1,2 (Robert Freestone ed., 2000).

⁸⁸ *Id.*

3. New Urbanism and the Way We Want to Live

The operative assumption, and one even born out by periodic polls conducted in various regions, is that the New Urbanism represents the way that Americans want to live.⁸⁹ There is little proof, however, that the various constituencies of today's cities, suburban towns or larger, inner ring suburbs hanker for a particular New Urban vision or for any at all. As one scholar has written, the ideology of New Urbanism is both "utopian" and "deeply fraught."⁹⁰ This is reflected in a rhetoric which assumes that the United States in general and its cities in particular are populated by like-minded persons who share a desire for "community" but who "have only the dimmest idea of what that means in terms of physical design."⁹¹ Though the New Urbanism movement pulls within its fold persons from varying social, economic, and racial backgrounds, it is none too clear that the "traditional" city that they all remember is the same one. "Well-founded" communities, it has been pointed out, often exclude, frequently by defining themselves against others and ultimately serve as barriers to rather than sources of social change.⁹² Though rarely acknowledged, the collective memory out of which new Urbanism has been created is contested and contingent.

To summarize, urban land use planning in the United States began as a mostly private system of land use regulation which, after the turn of the nineteenth century, ultimately evolved

⁸⁹ Peter Calthorpe & William Fulton, *The Regional City: New Urbanism & the End of Sprawl* 130 (2001).

⁹⁰ David Harvey, *The Spaces of Utopia*, in *Between Law and Culture: Relocating Legal Studies* 105 (David Theo Goldberg et al. eds., 2001).

⁹¹ James Howard Kunstler, *Home From Nowhere: Remaking Our Everyday World for the 21st Century* 194 (1996).

⁹² Harvey, *supra* note 90, at 105.

into widespread zoning schemes that all but replaced private land use schemes as a means of planning. Form-based code, a principal tool of New Urbanism, represents the next step in the evolution of land use planning; like zoning, this tool comes at time of massive social and economic change in the American urban environments. In such a context, the word community becomes even more a contested notion. For this reason, one of the most noteworthy features of the form based code, the community consultative process via the charrette, becomes a subject for significant critique.

III. The Charrette and the Nature of the “Community” in the Process of Developing the Form-Based Code

In writing about the communal nature of the city and the development of neighborhoods, Jane Jacobs expressed skepticism about the notion held by traditional planners that there was a sufficient commonality between people living in the same geographical area of a city so as to assume them to be allies for purposes of creating and maintaining successful cities.⁹³ She suggested, for example, that the several thousand residents of a particular section of a large city have no “innate degree of natural cross connection”⁹⁴ such as that presumed by traditional planners, and that hence, city planning which seeks to foster the growth of neighborhoods can have only limited success.⁹⁵ These observations remain true, and the differences between and among the residents in any particular section of a city remain one of the biggest challenges to

⁹³ Jacobs, *Great American Cities*, at 114-116.

⁹⁴ *Id.* at 115

⁹⁵ *Id.*

promoting communal interactions or obtaining communal consensus. As Jacobs understood, there is not necessarily a pre-existing body of persons who make up the community. Instead, there are often interest groups and these interest groups may serve as proxies for the community as a whole even while actively excluding some elements of the community.⁹⁶ Such groups may wield power in ways that corrupt or deform processes of group decision-making. Moreover, the decision to vest individuals in a community with a significant amount of neighborhood design autonomy may be politically inspired. It is for these reasons that the role of the charrette in implementing design-based code should be the subject of some concern.

A. The Multiple Strands of “Community” and the Charrette as a Tool of an Entrenched Elite

As some experts on form-based code have observed about traditional planning tools, there are assumptions, sometimes unstated, made about a wide set of communal and societal relations such as gender, racial, economic, and familial interactions.⁹⁷ These assumptions become embedded as norms in the framework of such planning processes and systems, and shift the balance of power resulting in the domination and marginalization of some groups. A shift to form-based code’s charrette process comprised of “rational” face-to-face meetings has the risk of replicating existing power dynamics, since the dominant are often better equipped to manage and

⁹⁶ Community Practice: Theories and Skills for Social Workers, David A Hardcastle, Patrice R. Powers and Stanley Wencour 112 (1997). As another observer wrote in 1953, it would be “naïve” to assume that club or community groupings will “open their membership to many elements in the community, including Negro citizens, labor, women and others.” Floyd Hunter, Community Power Structure: A Study of Decision Makers 259 (1969 University of North Carolina Press)(1953). These observations often prove as true now as they did in the middle of the last century.

⁹⁷ Sandercock, *supra* note 70.

control such processes. Because form-based code focuses on localized developments and the character of those developments, it potentially allows empowered elites not only to retain control of the planning process but to custom tailor their own neighborhoods without concern for the needs of the broader municipality. In the absence of a strong central municipal government to manage community design with an eye towards broad societal concerns such as environmental impact, the charrette could become a means of further disempowering the already disenfranchised.⁹⁸

The charrette process used in form-based code schemes is an example of what several planning scholars call “collaborative planning” or “communicative planning.” Such processes rely upon what has been called “inclusive argumentation.” One of the significant concerns of turning over a neighborhood to the form-based code process is whether such a process can or will take into account broader concerns such as environmental impact and infrastructure needs as well as issues of social equity and differential access to power. It has been observed, for example, that planning and zoning are not disconnected from political and social context, notwithstanding the effusions of “supply side” planning theorists who view such endeavors as essentially unproblematic.⁹⁹

⁹⁸ A number of scholars have written about the way that the privilege is often maintained in legal and law-like systems in the face of “delegalizing” or “deformalizing” processes. *See e.g.* Richard Abel, *Delegalization: A Critical Review of Its Ideology, Manifestations and Social Consequences*, in *Alternative Legal Forums and Alternatives to Law* 27 (Erhard Blankenburg et al. eds., 1980); *see also* Marc Galanter, *Why the Haves Come Out Ahead*, 9 *Law and Society Review* 95 (1974).

⁹⁹ Freestone at 2.

In the area of planning, there has long been insufficient attention to and a deep ambivalence about what is in many cases a clear cut differential in power or access to power.¹⁰⁰ Hence, what is needed is a focus on what has been described as the “dark side” of traditional land use planning.¹⁰¹ This would mean, for example, considering “demand side” planning concerns, acknowledging and even engaging the disorder of actual planning and design outcomes, and the lived experiences of participants in such processes. There is, in contrast to the utopian, apolitical and idealized history of zoning and planning, a “noir” history, one which addresses the very real fact that planning has been, and continues to be in a number of cases, a tool of social oppression.¹⁰² This is frequently true because planning projects are driven by elites.

B. Fears of “Responsibilitization” and the Establishment of “Government at a Distance”

¹⁰⁰ Bent Flyvbjerg, Bringing Power to Planning Research: One Researcher's Story, in Planning in a Global Era 117 (Andy Thornley & Yvonne Rydin eds., 2003).

¹⁰¹ Yiftachel *supra* at 396.

¹⁰² *Id.*; see also Oren Yiftachel, Planning and Social Control: Exploring the "Dark Side," 12 Journal of Planning Literature 395 (1998). As Yiftachel writes,

Most accounts of planning neglect to explain its frequent application for purposes of (deliberate) social control, as expressed in the oppression of peripheral groups. This is not to claim, of course, that planning is inherently regressive, but rather that its well-documented progressive potential should also be understood as having a more sinister accompanying 'dark side'. This dark side is particularly evident when planning is used by 'ethnic states' as part of their territorial policies, but is also rife in western societies governed by formal democratic principles of governance. *Id.* at 395

Control by elites remains a problem in the case of a relatively new planning or regulatory tool such as form-based code. This is true because form-based code relies upon what has been called “responsibilitization”—the politically inspired imposition of autonomy upon those who had previously lacked such autonomy.¹⁰³ Responsibilitization is seen in a number of areas, such as criminal enforcement via third party policing.¹⁰⁴ It is part of a broader societal move away from Keynesian welfarism,¹⁰⁵ which was exemplified by provision of services, and towards neo-liberal governance.¹⁰⁶ The key feature of neo-liberal governance is the way in which individuals are incorporated into the process of managing their own lives as an enterprise via rational

¹⁰³ Jane I. Collins, Transnational Labor Process and Gender Relations: Women in Fruit and Vegetable Production in Chile, Brazil and Mexico, in *Perspectives on Las Américas: A Reader in Culture, History, and Representation* 160, 167 (Félix V. Rodríguez & Matthew C Guttman eds. 2003).

¹⁰⁴ Lorraine Mazerolle & Janet Ransley, *Third Party Policing* 52 (2006). One frequently discussed form of responsibilitization is third party policing. Third party policing is a style of policing involving many different persons or entities, such as private individuals or community groups, who exercise regulatory control. *Id.* at 2. Those involved may be willing or unwilling partners. *Id.* This is because included within the regulatory framework for such policing schemes are mechanisms for the police to coerce participation by the threat of civil or administrative sanctions for the failure to participate. Kristian Williams, *Our Enemies In Blue: Police And Power In America* 241-242 (2004). Continued crime after the implementation of this form of responsibilitization is often seen not as a failure of police but of the citizens who are made “partners” in third party policing. *Id.* In like manner, turning planning processes over to citizens, particularly those ill-equipped to manage such processes, may easily make citizens rather than government liable for planning failure.

¹⁰⁵ John Maynard Keynes was a social democrat who greatly influenced the formation of the welfare state after World War II as a direct affront to the economic liberalism that had flourished in the United States from the 1800s until the early 1900s. Keynes’s theories challenged the notion that economic liberalism, characterized by an unrestrained market, little government intervention in economic and social policy, and reliance upon individual private initiative, was best for the success of a nation. See e.g. Sanford F. Schram, *Praxis for the Poor: Piven and Cloward and the Future of Social Science in Social Welfare* 213 (2002).

¹⁰⁶ *Id.* at 23

decision making.¹⁰⁷ Neo-liberalism engages in the “valorization of the self-actualized subject.”¹⁰⁸ This goal is typically achieved by two dominant modes of neoliberal practice: "government at a distance" wherein there is top-down reform of state apparatuses based on a market model.¹⁰⁹ This reform generally takes the form of deregulation and privatization.¹¹⁰ The second takes a bottom-down approach which centers on building the "social capital" of the individual.¹¹¹

The government at a distance model tries to improve government by partnering with private actors and bringing market behavioral and discursive practices into the government. An example of this is the way in which public school boards have had to be "competitive" and have called superintendents "CEOs."¹¹² The social capital model operates at the level of the individual and civil society and encourages individuals, and the communities to which they belong, to be responsible, autonomous and ultimately self-governing.¹¹³ Through such programs

¹⁰⁷ Alizon Draper & Judith Green, Food Safety and Consumerism: Constructions of Choice and Risk, in *Welfare of Food: Rights and Responsibilities in a Changing World* 54, 66 (Elizabeth Dowler & Catherine Jones Finer eds., 2003).

¹⁰⁸ Sean Patrick Eudaily, *The Present Politics of the Past: Indigenous Legal Activism and Resistance to (Neo)Liberal Governmentality* 52 (2004), citing Mitchell Dean, *Governmentality: Power and Rule in Modern Society* 155 (1999).

¹⁰⁹ Eudaily, *supra* note 108, at 52.

¹¹⁰ *Id.*, citing Bradford at 204.

¹¹¹ *Id.* citing Dean at 152.

¹¹² A number of large urban school districts have renamed their school superintendents CEOs (Chief Executive Officers), apparently in an effort to bring some of the virtues of private industry into what are often dysfunctional public school systems. See e.g. Virginia P. Collier et al., *The Superintendent as CEO: Standards-Based Performance* 1-3 (2005).

¹¹³ Eudaily, *supra* note 108, at 53.

neo-liberal government can achieve its objectives all while reducing its commitment to formal governance and resource provision.¹¹⁴ Form-based code closely resembles this social capital model and thus may be located in the arsenal of neo-liberal weaponry for revising government.

Form-based code, like many other neoliberal tools, typically implies the resituating of the boundaries between public responsibility and private duty, the citizen as client and customer in a marketplace responsible for their own happiness, success, and health.¹¹⁵ In such regimes, elites with education, money, and experience in formal processes are often able to take charge of the design process, resulting in the same sorts of outcomes that urban renewal undertaken under a broad neoliberal scheme wrought: fewer communities of color, fewer poor people, and fewer services for the members of those communities who remained after such processes were implemented.¹¹⁶

Because zoning and planning schemes are developed in a political process which is theoretically accessible to all, and because such schemes are broadly applicable to a municipality and because of its emphasis on health, safety, and welfare, zoning may also be viewed as broadly democratic and communitarian. In seventy-plus years since zoning schemes have been in use, the latter view seems to have won out in an ideological sense. This is in part because in many large urban areas, those who were historically disenfranchised such as racial minorities have taken control of the civic governments responsible for zoning and planning. It is just now, however, that zoning is in some circles becoming suspect and disfavored. Form-based code

¹¹⁴ *Id.*

¹¹⁵ Peter Brand & Michael J. Thomas, *Urban Environmentalism* 94 (2005).

¹¹⁶ Rachel Weber, *Extracting Vale From the City: Neoliberalism and Urban Development*, in *Spaces of Neoliberalism* 172, 183-187 (Neil Brenner & Nick Theodore eds., 2003).

has the potential to allow those without official political power in a city to control their own small fiefdom without effecting widespread changes to the benefit of all. A case in point is the city of New Orleans in the aftermath of Hurricane Katrina.

B. The Form-Based Code Process and the Case of Hurricane Katrina

On August 29, 2005, Hurricane Katrina, a massive category four¹¹⁷ storm, hit New Orleans, Louisiana and the surrounding Gulf Coast area, causing a level of destruction not experienced in the area in decades.¹¹⁸ Approximately eighty percent of New Orleans was flooded., with some of the most severe damage occurring in the Lower Ninth Ward, Central City, and the Seventh Ward, all areas heavily populated by African-Americans.¹¹⁹ In the period since Hurricane Katrina, poor black victims have been the slowest to return to New Orleans.¹²⁰ There are a number of the reasons for inability of poor black Katrina victims to return to New

¹¹⁷ Hurricane intensity is measured on the Saffir-Simpson Hurricane Scale. The scale ranges from 1 to 5, with 1 having the least intensity and wind speeds between 74 and 95 miles per hour, and 5 being the most intense with wind speeds greater than or exceeding 156 miles per hour. Hurricane Katrina was a Category 4 storm at 140 miles per hour. For a discussion of the development and use of the Saffir-Simpson Hurricane Scale, see Judith A. Howard & Ernest Zebrowski, *Category 5: The Story of Camille, Lessons Unlearned from America's Most Violent Hurricane* 211-235 (2005).

¹¹⁸ Prior to Katrina, the last storm to cause significant damage to New Orleans was Hurricane Betsy in 1965. However, it is generally asserted that no storm besides Katrina has wielded such destructive force in the United States since the 1928 Okeechobee hurricane, also known as the San Felipe hurricane, which killed over 3,000 people in Florida and Puerto Rico, and many hundreds more on the Caribbean island of Guadeloupe. The Okeechobee hurricane caused over 800 million dollars in damage in today's dollars. See generally Eliot Kleinberg, *Black Cloud: The Great Florida Storm of 1928* (2003).

¹¹⁹ New Orleans is divided into 17 wards. The Ninth ward, located in the easternmost downriver portion of the city is the largest of these wards and is arguably the most famous ward.

¹²⁰ William H. Frey & Audrey Singer, *Katrina and Rita Impacts on Gulf Coast Populations: First Census Findings*, in *The Brookings Institution: Cities and Suburbs* (last modified 2006, June) (last visited November 28, 2006) <http://www.brookings.edu/metro/pubs/20060607_hurricanes.htm>. Full report on file with the author.

Orleans.¹²¹ Perhaps chief among them is the absence of habitable dwellings, which has been exacerbated by the failure of local authorities to take full charge of the planning process and thereby create a framework for rebuilding.

Recently New Orleans officials chose to forego traditional comprehensive planning seen under a Euclidean zoning scheme in favor of a planning process that will delegate responsibility to fifteen planning teams who will be guided by groups of residents from various parts of New Orleans.¹²² Although the grand scheme calls for all of the individual neighborhood plans to be incorporated into a single master plan at some point, thus far there are no comprehensive guidelines being promulgated for the design of the neighborhoods. In the absence of new, broadly applicable standards, residents are free to rebuild in exactly the same manner that caused many properties to sustain serious and in some cases irreparable damage.¹²³ Groups of residents, while ostensibly empowered to affect their own neighborhoods or their own houses, are not empowered to undertake the sort of broad structural and environmental remediation needed to avoid future disasters.¹²⁴

Moreover, even if such consultations were able to reflect the views of the broader constituency, there is some concern that residents would avoid doing so in lieu of promoting

¹²¹ For a fuller discussion of the housing-related problems of poor blacks in New Orleans in the Aftermath of Hurricane Katrina, see Lolita Buckner Inniss, *A Domestic Right of Return? Race, Rights and Residency in New Orleans in the Aftermath of Hurricane Katrina*, forthcoming ____ Boston College Third World Law Journal (2007).

¹²² Nicolai Ouroussoff, *In New Orleans, Each Resident is Master of the Plan to Rebuild*, N.Y. Times (New York), August 8, 2006, The Arts, at B1.

¹²³ *Id.*

¹²⁴ *Id.*

their own parochial concerns based on commonalities like race, class, and economic status.¹²⁵ Indeed, it has been observed that community consultations in the context of civic planning are rarely able to capture the views of the most disempowered groups.¹²⁶ This last point is one of particular concern in New Orleans. New Orleans was a hotbed of race and class divisions before the hurricane and certainly remains so afterward. Moreover, New Orleans city planning processes, like those in many United States Southern cities, had long been dominated by elites; this was due in part to those cities' antebellum social structures.¹²⁷ It has been asserted that one of the principal reasons that post-Hurricane New Orleans opted for the community guided plan was that efforts to develop a comprehensive city-wide plan were challenged for failing to take into account racial and economic diversity.¹²⁸ By delegating the responsibility for planning to the resident-led design teams, the city was able to abdicate the broader responsibility that it would have had under a traditional Euclidean scheme.

Though a number of areas sustained significant damage in Hurricane Katrina and in Hurricane Rita, the storm that came less than a month later, some of the greatest damage occurred in low-lying predominantly black areas such as the Lower Ninth Ward and the Seventh Ward.¹²⁹ These areas also had the highest rates of poverty and the fewest resources in

¹²⁵ Ourousoff *supra*.

¹²⁶ John Friedmann, *The Prospect of Cities*, *supra* note 68, at 101.

¹²⁷ David R. Goldfield, *Planning For Urban Growth in the Old South*, in *The Rise of Modern Urban Planning, 1800-1914* 11, 12-15 (Anthony Sutcliffe ed., 1980).

¹²⁸ Ourasoff *supra*.

¹²⁹ New Orleans is divided into seventeen wards. The Ninth Ward, located in the easternmost downriver portion of the city, is the largest of these wards and is arguably the most famous ward.

general.¹³⁰ Many of the residents are little equipped to undertake the necessary measures to plan for the rebuilding of their neighborhoods. Already it has been observed that residents in affluent neighborhoods have been the best organized and thus best able to take advantage of the form-based process.¹³¹ This suggests that the neighborhoods that suffered disproportionately in Hurricane Katrina because of location and infrastructure disadvantages may risk having those same disadvantages carried over in the form-based code process. Yet, because such processes are to a great extent self-regulated, there is no central authority to whom they can turn for relief.

IV. Conclusion

There is no doubt that form-based code may hold promise for the revitalization of old cities and for the creation of new ones. Jane Jacobs, a critic of traditional planning and zoning schemes, announced at the outset of *The Death and Life of Great American Cities* that the book was intended as “an attack on current city planning and rebuilding.”¹³² Writing in 1961, Jacobs was speaking of the highly formulaic Euclidean-based zoning that was at the heart the planning schemes in United States cities, and of the explicit goals of such schemes were manifold – slum clearance followed by the creation more middle and upper income housing areas, and cultural,

The Seventh Ward, located near downtown New Orleans extending from Esplanade Avenue to Elysian Fields, is one of the lesser known areas of New Orleans, yet one of the hardest hit by the flooding in the aftermath of Hurricane Katrina. See Rod Amis, *Katrina and the Lost City of New Orleans* 64- (2005)

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¹³¹ Ourossoff at B1

¹³² Jacobs, *Great American Cities*, *supra* note ____ at 1.

civic, and commercial centers to serve the new populations.¹³³ Such explicit civic planning, wrote Jacobs, often failed.¹³⁴ This was because it failed to take into account that there was order underlying even the seeming unplanned disorder of successful cities, order that resulted from “an intricate and close grained diversity of uses.”¹³⁵ Form based is a New Urbanist tool whose goal is to reinstate form and utility based cityscapes of the pre-zoning period of American cities.

Form-based code, however, attempts to reproduce traditional city diversity in all of its meanings by moving away from a formal rational legal system¹³⁶ of traditional Euclidean zoning and planning and towards a more substantively rational law¹³⁷ growing out of self-government. Form-based code, however, is not “un-planning, it is alternate planning by persons who in many cases may not be accountable. As such it offers a flawed answer to the problems of a more formal, centralized zoning and planning regime. As Arthur Stinchcombe writes in *When Formality Works*,¹³⁸ there is an increased assault upon formality in legal and social systems because of misconceptions about how formality functions.¹³⁹ Formality in the context of traditional zoning is not the source of ill-functioning cities, social exclusion or the skewed power dynamics that are often seen in American cities . Rather, these ills and especially the creation

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Jacobs, *Great American Cities*, at 14.

¹³⁶ Formal rationality refers to a system of law which creates and applies a body of universal rules to a particular area of endeavor. See Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 *Law and Society Review* 239, 240 (1983), citing Rheinstein 1954 64, 39

¹³⁷ Substantively rational law achieves a specific purpose or goal. *Id.* at 240, citing Rheinstein, 63, 303.

¹³⁸ Arthur L. Stinchcombe, *When Formality Works: Authority and Abstraction in Law and Organizations* (2001).

¹³⁹ *Id.* at 2

and maintenance of privilege are accomplished myriad means. What New Urbanists fail to acknowledge is that form-based code, all while promoting an ethic of neighborhood self-government, may itself be co-opted as a tool for perpetuating disadvantage.