

Making Main Street Legal Again: The SmartCode Solution to Sprawl

“All human communities involve an intense interplay between the individual and the law.”
--Vincent Scully¹

I. Introduction

For those concerned with the sustainability of today’s land development patterns, there looms an unfortunate yet eye-opening reality: presently, if a developer wants to develop a project similar to classic American communities such as Charleston, Savannah, Key West, or Alexandria, in most jurisdictions, doing so would be illegal under existing zoning codes.² Similarly, if a developer sought to develop a neighborhood with a traditional corner store or a classic American main street where the shopkeeper lived about her shop, many existing zoning codes would legally prohibit such a result.

The stark reality is that, in most jurisdictions within the United States, traditional town and neighborhood planning techniques are illegal because many of today’s conventional zoning codes either prevent their use expressly or by effect.³ And, even worse, this is not a recent phenomenon but rather the result of an outdated zoning scheme that dates back to the early 1900s. A zoning system that, as this article will show, has now outlived much of its original purpose and usefulness.

Fortunately, a growing group of land planners and attorneys have developed a comprehensive legal response to this unsustainable reality—a response whose leading purpose is to legalize the use traditional planning techniques in our regions, communities, neighborhoods, and streets. Known as the SmartCode and developed by leading town planner Andres Duany, this response is not simply an abstract theory or proposal, but rather an actual regulatory document that can be adopted by local jurisdictions to enable the legal use of traditional planning techniques.⁴ At its core, the SmartCode is “a fundamentally different vision of how cities should be coded” as it codifies many of the traditional planning techniques that today are advocated by the New Urbanism

¹ Vincent Scully, *The Architecture of Community*, in THE NEW URBANISM: TOWARD AN ARCHITECTURE OF COMMUNITY 228 (Peter Katz, 1993).

² Victor Dover, *Alternative Methods of Land Regulation*, at http://www.spikowski.com/victor_dover.htm (last visited Jan. 21, 2006); see also Andres Duany & Emily Talen, *Making the Good Easy: The SmartCode Alternative*, 29 Fordham Urb. L.J. 1445 (2002). “It is legally difficult to build good urban places in the United States. The vast majority of conventional zoning codes prohibit the replication of our best examples of urbanism”. *Id.*

³ Andres Duany, Elizabeth Plater-Zyberk & Jeff Speck, *Suburban Nation: The Rise of Sprawl and the Decline of The American Dream* xi (North Point Press 2000) [hereinafter *Suburban Nation*].

⁴ Daniel Slone, *Legal Context for the SmartCode*, at <http://www.placemakers.com/library/LegalContext.doc> (last visited Jan. 21, 2006). “Just as the transect must be locally calibrated in order to lay the proper basis for the Smart Code, the legal elements must also be locally calibrated. Different parts of the country have different limits on various techniques and strategies used in the Smart Code. The code can easily be adjusted for these differences.” *Id.*

movement—techniques such as mixing uses, utilizing interconnected street networks, and designing compact, walkable, and environmentally-sustainable communities.⁵

This article will analyze the format of the SmartCode and, since the SmartCode is a model code that must be legally customized for local jurisdictions, the article will further explain the legal steps that communities must take in order to implement the SmartCode as a zoning option. While doing so, the article will also examine how the strict Euclidean structure of today's conventional zoning codes has necessitated the creation of the SmartCode in order to allow communities to legally utilize traditional town and neighborhood planning techniques.

The SmartCode, by codifying traditional town planning techniques and many of the objectives of New Urbanism, enables communities to once again legally build historically cherished places like Charleston, San Francisco, Santa Fe--or a simple small town main street and neighborhood corner store.⁶ This article will explain how this can be accomplished.

II. A Regulatory Reprieve for Traditional Town Planning

While this article will discuss a variety of regulatory tools that have incrementally increased the ability of municipalities to legally engage in traditional town planning, none of these tools achieve the consistency and comprehensiveness of the SmartCode's approach toward legalizing traditional planning techniques. One indication of this is that, while still a relatively nascent tool,⁷ the SmartCode is quickly becoming a leading choice of many communities seeking to make traditional town planning legal again.

In particular, according to recent statistics, more than 10 U.S. communities have adopted the SmartCode in some part, while at least 22 other communities are working toward doing so.⁸ Consisting of a wide variety of sizes, these communities cover a broad range

⁵ Duany & Talen, *supra* note 2, at 1445. The Congress for the New Urbanism, Charter of The New Urbanism sets out the New Urbanism movement's goals for creating walkable, sustainable, and diverse communities and is available at <http://www.cnu.org/aboutcnu/index.cfm?formAction=charter> (last accessed Jan. 21, 2006).

⁶ And, lest, some suggest that New Urbanism is little more than a fringe effort, even the American icon Walt Disney himself embraced some of the same key planning principles as New Urbanists: "I believe people still want to live like human beings. But there are a lot of things that could be done. I'm not against the automobile but I just feel that you can design so that the automobile is there but still put people back as pedestrians again. I'd love to work on a project like that." THE QUOTABLE WALT DISNEY 72 (Dave Smith ed., Disney Editions 1st ed. 2001).

⁷ The SmartCode was first published as a unified zoning code in January of 2003. Maricé Chael, *The SmartCode: A Weapon to Fight the Sprawl War*, at <http://www.tndtownpaper.com/Volume5/smartcode.htm>. Its publication was the culmination of a multi-year development process as described by Andres Duany, lead developer of the SmartCode, "[t]he SmartCode went off to the publisher today. It was a four-and-a-half-year wrestling match between the American reality and the American ideal. It was by far the most difficult thing that I have ever done." *Id.*

⁸ For a listing of municipalities in the United States that have adopted or are in the process of adopting a SmartCode, see <http://www.placemakers.com/info/infoClear.html>. These communities include: Belmont, NC; Coconut Grove, FL; Miami, FL; Fort Myers, FL; Petaluma, California; Sarasota, FL; West Palm Beach, FL; Flowood, MS; Pike Road, AL; Montgomery, AL, and Leander, TX.

of the different community types throughout the United States.⁹ Indeed, the fact that the SmartCode has been embraced by so many different community types begs an obvious question: *What about the SmartCode makes it such a valuable legal zoning and planning tool for such a wide range of communities?*¹⁰

To answer that question, one must first answer a basic question, namely, *what is the SmartCode?*

A. The SmartCode and Transect-Based Zoning

Currently, most zoning laws regulate land based on how a landowner uses a particular piece of land, with such regulation generally being known as Euclidean zoning.¹¹ While originally helpful for some purposes, use-based zoning ordinances are now one of the leading factors inducing unsustainable development patterns commonly referred to as sprawl and often associated with contemporary suburban projects.¹²

As a threshold issue though, on the subject of suburban sprawl, one important clarification must be made in order to understand today's problem in proper context: suburban development is neither a recent phenomenon in this country nor an inherently unsustainable type. Indeed, suburban development in the United States dates back to the early 1800s¹³ and includes such projects as the "borderland" communities outside major cities such as Boston and New York¹⁴ as well as the English park villa and religious communitarian "picturesque enclaves" of the mid 1800s.¹⁵ In fact, noted landscape

⁹ *Id.*

¹⁰ In fact, in a twist of irony, Bentonville, Arkansas—the home base of what many New Urbanists consider to be the leading facilitator of sprawl, namely Wal-Mart—has begun a community discussion regarding how the SmartCode might facilitate its redevelopment. Rachel Lianna Davis, *Smart Code Zoning Could Help Traffic Woes*, THE BENTON COUNTY DAILY RECORD (Bentonville, Ark.), May 16, 2005, available at <http://nwanews.com/story.php?paper=bcd§ion=News&storyid=20607> (last visited Jan. 21, 2006).

¹¹ John R. Nolen, *Flexibility in the Law: The Re-engineering of Zoning to Prevent Fragmented Landscapes*, N.Y.L.J., Feb. 18, 1998. ("Euclidean zoning encourages local governments to separate land uses into small geographical areas known as zoning districts. It locates single family housing here, neighborhood commercial development there, and some mixed uses in yet a different, segregated district of the community.")

¹² See DOLORES HAYDEN, *A FIELD GUIDE TO SPRAWL* (W.W. Norton & Company 2004).

¹³ Brooklyn Heights—a 60-acre parcel outside New York City that was developed by Hezekiah Pierrepont, an early supporter of the steamboat, around 1820—is often considered to be the first suburb in the United States. See DOLORES HAYDEN, *BUILDING SUBURBIA: GREEN FIELDS AND URBAN GROWTH 1820-2000* 46 (Pantheon, 1st ed. 2003).

¹⁴ See *id.* at 21-44 for a general discussion of "Borderland" developments. These developments were early suburban locales where "residents delighted in natural settings where they could look back at the city they had escaped, yet [savor] being close enough to engage with urban life on a regular schedule." *Id.* at 24. Indeed, an early example of a borderland project, Weehawken, New Jersey, represented one of the earliest (albeit rough) examples of what today is called a transit-oriented development—that is, a often-suburban project build around a local transit node—which in the case of Weehawken constituted water transportation from that suburb to New York City. *Id.*

¹⁵ *Id.* at 45-70. "Picturesque enclaves" can be defined as a compilation of borderland developments in which "the designers of enclaves added a sense of community to the borderland goals of house and land, becoming the first to express the triple dream." *Id.* at 45. Some of the earliest examples included Shaker

architect Frederick Law Olmstead (planner for such famous projects as New York City's Central Park and the Chicago area Riverside community) once opined that "no great town can long exist without great suburbs."¹⁶

Thus, it is not surprising that the SmartCode contemplates a sub-urban transect zone.¹⁷ Still though, what they might share in name with today's typical suburban development, historical suburbs generally do not share in design or plan. So, while Americans have sought suburban living since the early years of this country, as will be detailed in the following sections, it has only been within the last 75 years that suburban developments have become increasingly synonymous with the unsustainable sprawl of use-based zoning.¹⁸

Fortunately, in response to the realization that use-based land regulation is leading to unsustainable results, an increasing number of municipalities have turned to zoning codes that regulate the "form" of the built environment—aspects such as a building's disposition and configuration—and, in doing so, have relegated the building's use to, at most, a secondary consideration.¹⁹ These codes are aptly termed "form-based codes."²⁰

And, in one respect, the SmartCode is a form-based code. However, it also moves beyond regulating only the form of a specific piece of land and instead further regulates how a singular form fits into the larger context of a region.²¹ This additional layer makes the SmartCode not only a form-based zoning code but also transect-based code.²²

Of course, in the context of town planning, this may lead to an obvious question: "What is a transect?"

To answer that question, one must first look to the environmental origins of this important tool. A transect is an ecological concept that visually demonstrates how different natural environments are ordered on a progressive scale from rural to urban

settlements and secular "associations" patterned on the ideas of French social theorist Charles Fourier of combining agriculture and industry into a cohesive settlement. *Id.* at 51.

¹⁶ *Id.* at 62. Admittedly though, even then Olmstead had conflicting views of suburbs—on one hand referring to them in application as "rude, over-dressed villages" and "fragmentary half-made towns" while considering them in theory to be "the most refined and the most soundly wholesome forms of domestic life, the best application of the arts of civilization to which mankind has yet attained." *Id.*

¹⁷ SmartCode version 7.6, Table 1, *available at* <http://placemakers.com> (last visited Jan. 21, 2006).

¹⁸ However, even as recently as 1923, traditional planning techniques were still used to plan suburban developments as in the case of Mariemont, Ohio—a suburb of Cincinnati—designed by noted urban planner John Nolen in the early 1920s. See MILLARD F. ROGERS, JOHN NOLEN AND MARIEMONT: BUILDING A NEW TOWN IN OHIO, (Johns Hopkins University Press, 2001).

¹⁹ Jason Miller, *Smart Codes, Smart Places*, at

<http://www.realtor.org/SG3/Pages/summer04sm?OpenDocument> (last visited Jan. 21, 2006).

²⁰ Jason Todd Burdette, *Form Based Codes: A Cure for the Cancer Called Euclidean Zoning*, at <http://scholar.lib.vt.edu/theses/available/etd-05122004-113700/> (last visited Jan. 21, 2006).

²¹ Andres Duany, *A New Theory of Urbanism*, SCIENTIFIC AMERICAN, Dec. 2000 [hereinafter *A New Theory*].

²² *Id.* See also Andres Duany & Emily Talen, *Transect Planning*, AM. PLAN. ASS'N J. Summer 2002, at 247-249 (for a detailed explanation of transect-based planning and its origins) [hereinafter TRANSECT PLANNING].

habitats.²³ When applied to a zoning system, the transect defines where, within a progression of six rural to urban environments (called “transect zones”), a particular form of a building is properly situated.²⁴

Adding this additional layer of appropriate overall context to the regulation of the form of the built environment is crucial in creating a cohesive and properly-organized development pattern as effectively demonstrated by this example: consider that you’ve decided to hire a world-renowned tailor to create for you the finest of tuxedos. Cost is no issue so you instruct him to use the best of fabrics and materials, taking as much time as necessary to tailor together a tuxedo masterpiece. Thereafter, he completes his task and indeed the result is a truly magnificent tuxedo—one of the finest that money could buy. You then put it on and wear it to...*a square dance*

Obviously, if you did this, you’d look quite out of place (or context, if you will) at the square dance—not because there is anything wrong with the form of the tuxedo, indeed the form is perfect. Rather, the problem is with where the form was located—in this case the well-formed tuxedo is out of context at a rural square dance instead of at an urban symphony, opera or the like.

The same holds true for form-based zoning codes when considered alone. A form-based code can effectively regulate the sustainable development of a building or even block, but if that same building or block is not properly ordered within a cohesive rural to urban context, then the building’s form could be just as out of place as that of a tuxedo at a square dance. This is why incorporating the element of transect-based zoning is so important - it incorporates and orders the regulation of building and block form into the larger overall built environment context.

Below is an example of a transect as applied to the zoning progression of an area.²⁵ In this case, the transect begins on the left with the most rural environment and horizontally progresses to the right into more urban environments, ultimately reaching the most urban T6 transect zone—one which would be analogous to the downtown of a major U.S. city.²⁶

²³ TRANSECT PLANNING, *supra* note 22. Duany defines the transect as “a geographical cross section through a sequence of environments—for example from wetland to upland, or tundra to foothill.” *Id.*

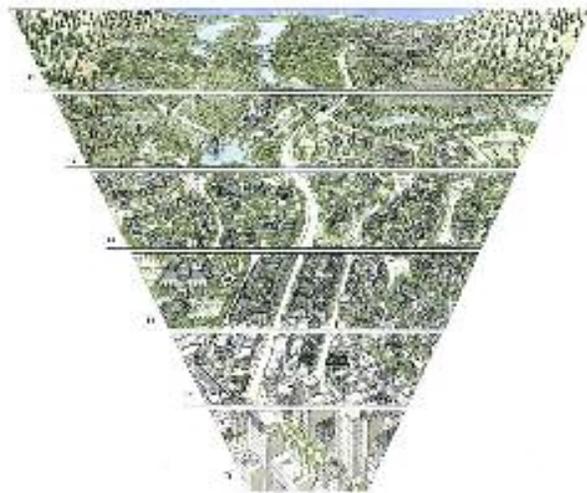
²⁴ *Id.* at 247.

²⁵ Unless otherwise noted, all diagrams in this article are used courtesy of ©Duany, Plater-Zyberk & Company.

²⁶ See SmartCode & Manual, Table 1, at http://www.placemakers.com/smartcode/3000-01-Commentary_8.0.pdf (last visited Jan. 29, 2006).



Below is the same type transect only this time the most rural environment is at the top with the more urban transect zones progressing down the diagram.



The underlying reasoning for using the transect as the basis for a legal zoning code is represented by the simple yet compelling idea that “[r]ural elements should be located in rural locations, while urban elements should be located in more urban locations.”²⁷

Significantly, the actual adoption of a transect-based zoning code does not entirely eliminate use-based zoning. Indeed, a transect-based zoning code like the SmartCode continues to regulate uses to some degree. Take for instance an office building. Under Euclidean zoning, such a building would generally only be permitted in those use districts that the conventional zoning code permits commercial uses.²⁸ And, frequently, this ends up resulting in isolated, single-use office parks located in low-density suburban fringes, often accessible only by car and strictly segregated from any other type of uses. Thus, under this scenario, it is essentially illegal for the lawyer or accountant or architect to live

²⁷ TRANSECT PLANNING, *supra* note 22, at 247.

²⁸ *Id.* at 255.

above their office, as has been a traditional model for many years, because doing so would impermissibly “mix” residential and office uses.²⁹

Under the SmartCode, an office building is still allowed but only in the transect zone most appropriate to its form.³⁰ Thus, a one- or two-story office building might be permitted in a less urban transect zone--where most other structures are also one or two stories tall--whereas a multi-story office building would be permitted only in the more urban transect zones where taller buildings are the proper form.³¹ The result is that the mono-use office parks that are often today found on the suburban fringe would be prohibited because multi-story, single-use and high-density commercial buildings are out of context in rural or semi-rural environment.

Similarly, under the SmartCode, high-speed thoroughfares are permitted in rural environments where their interaction with pedestrians is less likely, but prohibited in more urban environments where pedestrian travel is prioritized because of the more compact and walkable design.³² Notably though, this is just the opposite from many of today’s high-speed, multi-lane car-centric freeways that frequently dissect the urban, walkable framework of downtowns and main streets.

Under the SmartCode approach, a transect-based zoning code does not prohibited uses but rather organizes them into the transect zone most appropriate to their form and overall context.³³ Meaning that, “the transect does not eliminate the standards embodied in present zoning codes. It merely assigns them to the sections of the transect where they belong.”³⁴ As an example of the transect at work, Andres Duany explains how a common feature of use-based zoning codes--street width measurements--are addressed by the SmartCode’s transect system:

[t]he existing requirements for street width are not deemed to be right or wrong but rather correctly or incorrectly allocated. Wide streets may be appropriate where speed of movement is justified, even at the expense of the pedestrian environment.³⁵

²⁹ Edward A. Tombari, *Smart Growth, Smart Choices: Mixed Use Whitepaper*, at http://www.nahb.org/fileUpload_details.aspx?contentID=39196 (last accessed Jan. 21, 2006). “Since the first American cities were founded in the 17th century, mixed-use development has always been part of the American urban landscape. It was not until after World War II that a movement toward complete segregation of land uses dominated the new American urban landscape” *Id.*

³⁰ SmartCode, *supra* note 17, at Table 10c.

³¹ SmartCode, *supra* note 17, at Table 8.

³² *Id.*

³³ *Id.* at 247; “The transect approach is essentially a matter of finding an appropriate spatial allocation of the elements that make up the human habitat.” *Id.*

³⁴ *A New Theory*, *supra* note 21.

³⁵ *Id.* Duany similarly addresses another representative example, namely drainage systems: Similarly, current standards for closed drainage systems are not wrong; it is just that they are appropriate only for urban areas with curbs and sidewalks. In rural areas, rainwater can infiltrate through deep, green setbacks and swales. In fact, the transect widens the range of design options. Under conventional codes, for example, front setbacks must either be a 25-foot grass yard or a paved parking lot. The transect offers at least six more options. *Id.*

Thus, the transect “widens the range of design options” by permitting a broad variety of uses, whether it be single use, low density semi-rural development or a mixed-use, high density urban development, regulating always by where that type of development is appropriate within the rural-to-urban environment.³⁶ While seemingly a very logical and intuitive way to plan all types of built environments, from rural farms to urban downtowns, the reality is that this approach is often barred by today’s conventional zoning codes. The next section discusses how and why this has happened.

III. The Illegality of Traditional Town Planning Under Today's Conventional Zoning Scheme

In order, to fully understand how the SmartCode legalizes traditional planning techniques, one must understand exactly how these techniques are defined. While there is not an exhaustive list of what constitutes traditional town planning, several resources—both historical and contemporary—serve to generally outline the principles that planners have historically used to create traditional towns and neighborhoods.

A. The Contemporary Renewal of Traditional Town and Neighborhood Planning

In 1991, the Local Government Commission, a non-profit group advocating the designing and building of sustainable communities, gathered a group of leading New Urbanists to develop a set of guiding principles on how communities could rediscover the benefits of traditional town planning.³⁷ Known as the Ahwahnee Principles, these proposals recommended a return to the traditional planning techniques of compact, walkable, mixed-use communities centered around transit nodes.³⁸ At the same time, the Ahwahnee Principles recognized the importance of protecting open space so that communities could preserve agricultural and natural features along with other important rural terrain.³⁹ The Preamble of the Ahwahnee Principles is especially informative as it provides:

Existing patterns of urban and suburban development seriously impair our quality of life. The symptoms are: more congestion and air pollution resulting from our increased dependence on automobiles, the loss of precious open space, the need for costly improvements to roads and public services, the inequitable distribution of economic resources, and the loss of a sense of community. By drawing upon the best from the past and the present, we can plan communities that will more successfully serve the

³⁶ *Id.*

³⁷ Judith Corbett, *The Ahwahnee Principles: Toward More Livable Communities*, at http://www.lgc.org/freepub/land_use/articles/ahwahnee_article/page01.html (last visited Jan. 21, 2006).

³⁸ Ahwahnee Principles for Resource-Efficient Communities, *available at* <http://www.lgc.org/ahwahnee/principles.html> (last visited Jan. 21, 2006). The name Ahwahnee Principles came from the fact that the final version of the principles was presented to over 100 elected officials at the Ahwahnee Hotel in Yosemite. *See Corbett, supra* note 37.

³⁹ Corbett, *supra* note 37.

needs of those who live and work within them. Such planning should adhere to certain fundamental principles.⁴⁰

Although developed in 1991, these principles actually represent a renewal—or even rediscovery—of the traditional techniques used to plan communities prior to the advent of zoning in the early 1900s.⁴¹ Indeed, with zoning being so pervasive today, it can be somewhat hard to imagine communities being created without it. Yet, that is exactly what happened prior to the 1900s.⁴² This is especially significant when one considers that many of the cities and towns that today are considered classic examples of sustainable communities, such as Alexandria, Virginia or Savannah, Georgia, were planned before zoning even existed. In order to emulate those successes, the Ahwahnee group embraces many of the same planning techniques that, even prior to the advent of zoning, have yielded great cities throughout history. The following section briefly looks at the origins of these techniques.

B. The Historical Origins of Traditional Town and Neighborhood Planning

One of the most commonly shared traits among historically well-planned towns and cities has been their use of interconnected patterns for street and block design.⁴³ As demonstrated in the image below which contrasts historical planning techniques with contemporary planning techniques, an interconnected system is superior to today's sprawl-inducing unconnected approach because it “disperses traffic by providing a variety of pedestrian and vehicular routes to any destination.”⁴⁴

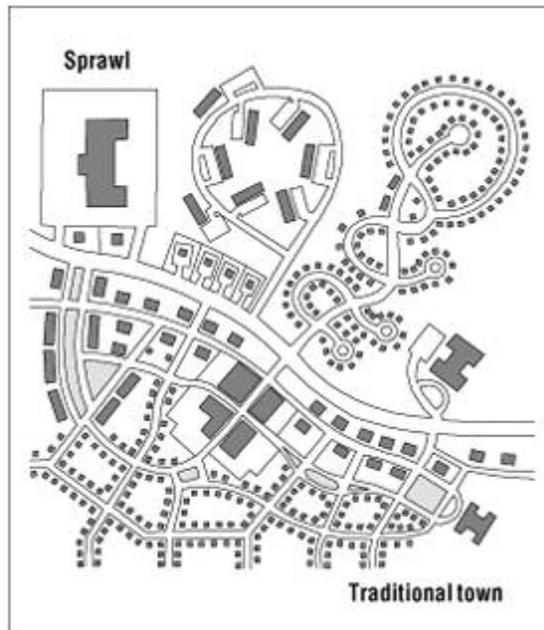
⁴⁰ Peter Calthorpe et al., *Ahwahnee Principles for Resource-Efficient Communities*, at <http://www.lgc.org/ahwahnee/principles.html> (last visited Jan. 31, 2006).

⁴¹ See Corbett, *supra* note 37.

⁴² Victor Dover, *Alternative Methods of Land Regulation*, at http://www.spikowski.com/victor_dover.htm (last visited Jan. 21, 2006).

⁴³ See PHILIP LANGDON, *A BETTER PLACE TO LIVE: RESHAPING THE AMERICAN SUBURB*, 123-126 (U. of Mass. Press, 1997) (for a good discussion on the importance of interconnecting neighborhood and town networks). Langdon argues that “the shape and character of the streets play a key role in the traditionalist approach.” *Id.* at 123. A successful street network should maintain frequent and regular connections in order to “help visitors avoid getting lost—and that make the communities enticing to explore again and again.” *Id.* at 125.

⁴⁴ Robert Steuteville, *The New Urbanism: An Alternative to Modern, Automobile-Oriented Planning and Development*, at <http://www.newurbannews.com/AboutNewUrbanism.html> (last visited Jan. 21, 2006).



Notably, the interconnected pattern traditionally used to plan sustainable, walkable communities is hardly a new creation but instead traces its origins back to the seventh century B.C. Ionian cities of Asia Minor.⁴⁵ Years later, early Roman architect Vitruvius continued this practice by focusing on the building block scale of interconnected street networks.⁴⁶ Ultimately, these principles would end up influencing town designers ranging from the Italian Renaissance period to 17th century New Haven, Connecticut.⁴⁷ In fact, the concept of planning cities by the form of their buildings and the context of their surroundings was introduced as early as the 1500s by Renaissance designers.⁴⁸

As cities and towns in the United States continued to develop at the turn of the 20th century, these traditional planning principles continued to find favor among town planners.⁴⁹ Indeed, it was not until the 1920s that town planners began to discard these traditional planning principles on a wide scale basis in exchange for strictly separated single use districts and buildings designed to exist in isolation rather than in context to a larger block and neighborhood.

The result was a mass exodus to fringe suburbia. This unsustainable condition reached its pinnacle in the years from post World War II America until the late 1970s—a timeframe that can accurately be described as the Dark Ages of traditional town planning in the United States.

⁴⁵ JONATHAN BARNETT, *THE ELUSIVE CITY 3* (Harper & Row Publishers 1986).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Michael Hebbert, *New Urbanism, Old Urbanism: Old Urbanism and the Climacteric of 1900*, at <http://www.cnu.org/pdf/Hebbert.pdf> (last visited Jan. 19, 2006).

To understand how this has happened, a brief history of the development of use-driven zoning regulations in United States is necessary as it reveals that, though single use zoning was created as a logical response to certain problems of that time, its usefulness has, by and large, been mitigated by advances in technology to the point that single use Euclidean zoning has essentially devolved into a regulatory hurdle that threatens the very sustainable existence of our communities.

IV. How Single Use Zoning Became the Dominant Land Planning Legal Scheme

Even though comprehensive zoning ordinances whose primary focus is to regulate the land uses within a jurisdiction now serve as the primary land use regulatory tool for municipalities that has not always been the case. Indeed, some commentators have traced the origins of land controls back to 16th and 17th century English laws that regulated building types and configuration—including, in some cases, even the size of doors and windows.⁵⁰ Alternatively, others have traced the origins of these ordinances to early Colonial laws such as a 1692 Massachusetts use-based ordinance that zoned precisely where certain industrial uses could occur.⁵¹ Whatever the exact origins, the authority of municipalities to adopt contemporary zoning regulations can be traced directly to the states' traditional police power.

A. The Birth of Single Use Zoning: Early Land Use Ordinances

As early as 1824, in *Gibbons v. Ogden*⁵², the United States Supreme Court recognized that states possess (and may assign to local governments) the power to protect the general welfare, safety, morals, and health of its citizens, often termed the states' "police powers".⁵³ Before 1916, U.S. communities relied on a mixture of nuisance laws⁵⁴ and

50 SIR WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 132-133 & 304 (London: Methuen & Co. 4th ed. 1924).

51 See Acts and Resolves of the Province of Massachusetts Bay 1692-93 C.23, at <http://www.cdc.gov/nceh/publications/books/housing/cha5.htm> (last visited Jan. 21, 2006). It particular, the statute provided in pertinent part:

"Be it ordained and enacted by the Governor, Council and Representatives convened in General Court or Assembly, and by the authority of the same,

Sect. 1 That the selectmen of the towns of Boston, Salem, and Charlestown respectively, or other market towns in the province, with two or more justices of the peace dwelling in the town, or two of the next justices of the country, shall at or before the last day of March, one thousand six hundred ninety-three, assign some certain places of the said towns (where it may be least offensive) for the erecting or setting up of slaughterhouses for the killing of all meat, stillhouses, and houses for trying of tallow and currying of leather (which houses may be erected of timber, the law referring to building with brick or stone not withstanding) and shall cause an entry to be made in the townbook of what places shall be by them so assigned, and make known the same by posting it up in some public places of the town; by which houses and places respectively, and no other, all butchers, slaughtermen, distillers, chandlers, and curriers shall exercise and practice their respective trades and mysteries..."

⁵² *Gibbons v. Ogden*, 22 U.S. 1 (1824).

⁵³ Michael F. Reilly, *Transformation at Work: The Effect of Environmental Law on Land Use Control*, 24 Real Prop. Prob. & Tr. J. 33 (1989).

⁵⁴ *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237-238 (1907).

building scale ordinances⁵⁵ to regulate land development.⁵⁶ Some, such as an 1880 San Francisco ordinance that essentially prohibited Chinese persons from operating laundries in wood buildings, were obviously intended to regulate more than just land use and, ultimately, were struck down by the Supreme Court.⁵⁷

However, other laws, such as a set of 1904 and 1905 Massachusetts regulations that together combined to allow Boston officials to divide the city into districts and then limit the height of buildings in each district, were upheld by the Court and, as a result, served as early examples of constitutionally permissible land use controls.⁵⁸ Indeed, the United States Supreme Court first addressed the issue of whether land use ordinances constituted a valid exercise of a police power in 1900 when it upheld the constitutionality of a New Orleans ordinance that restricted in which “zones” houses of prostitution may be located.⁵⁹

Significantly though, prior to 1916, these nascent land use laws fell short of *comprehensively* regulating land use in their jurisdiction. It was not until 1916 that the nation’s first comprehensive zoning law was adopted—a notable event that spurred what would soon become a zoning boom in the United States.⁶⁰ That year, New York City adopted a zoning ordinance that categorized land uses, created districts appropriate for those categorized uses, and then transposed the districts, or zones, onto a map of the city.⁶¹

A local regulatory committee known as the City of New York Board of Estimate and Apportionment passed the ordinance, entitled the Building Zone Resolution, in part to govern the growing building heights that were increasingly creating a “canyon effect”

⁵⁵ JULIAN CONRAD JUERGENSMEYER & THOMAS L. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 44* (West Group 2003).

⁵⁶ The extent to which each of these factors served as the basis for land use controls is the subject of debate especially in the case of nuisance law as one author has noted, “[m]oreover, those roots [of land controls] go back to the exercise of regulatory authority over the use of land, not, as is sometimes suggested, to the common law of nuisance.” DAVID CALLIES ET AL., *CASES AND MATERIALS ON LAND USE 1* (West Publishing Co. 4th ed. 2004).

⁵⁷ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In overturning the plaintiff’s conviction for violating the ordinance, the Court found that “[t]he necessary tendency, if not the specific purpose, of this ordinance, and of enforcing it in the manner indicated in the record, is to drive out of business all the numerous small laundries, especially those owned by Chinese, and give a monopoly of the business to the large institutions established and carried on by means of large associated Caucasian capital...” *Id.* at 1068.

⁵⁸ *Welch v. Swasey*, 214 U.S. 91, 93 (1909) (in this case, the plaintiff sought to build a 124 foot building in a district that allowed a maximum 100 foot building).

⁵⁹ *L’Hote v. New Orleans*, 177 U.S. 587, (1900).

⁶⁰ As with many “firsts”, there is often general agreement but rarely unanimous agreement. Such is the case in this instance as several commentators insist that Los Angeles was the first municipality to adopt a comprehensive zoning code. See Joel Kotkin, *Our Future Neighborhoods Housing and Urban Villages in the San Fernando Valley*, at <http://publicpolicy.pepperdine.edu/davenportinstitute/reports/neighborhoods/neighborhoods2.html> (July 2003) (“This ambitious vision was codified in 1908 when the City created the first comprehensive urban zoning ordinance in the nation”) Regardless of which city was first, the result is the same, namely, that single use zoning was born of urban stock in the early 1900s.

⁶¹ See City of New York, Board of Estimate and Apportionment, *Building Zone Resolution*, at http://biotech.law.lsu.edu/cphl/history/laws/1916NYCode_clean.pdf (last visited Jan. 21, 2006).

where sunlight could not reach the street level.⁶² Of particular concern was the newly constructed 42-story Equitable Building in lower Manhattan whose bulk darkened the street level during much of the day.⁶³

According to its introduction, the goal of the ordinance was:

...regulating and limiting the height and bulk of buildings hereafter erected and regulating and determining the area of yards, courts and other open spaces, and regulating and restricting the location of trades and industries and the location of buildings designed for specified uses and establishing the boundaries of districts for the said purposes.⁶⁴

Another major goal of the ordinance was to separate those land uses whose close proximity were deemed “incompatible” with each other—primarily meaning factories from residential neighborhoods.⁶⁵ Significantly though, the ordinance was not a static document but rather was regularly updated in response to external factors such as technology changes and population shifts with its future evolution limited only by the simple requirement under New York law that it comport to a “well-considered plan”.⁶⁶

After its adoption, the ordinance was soon challenged in court as an improper encumbrance on property.⁶⁷ However, the Court of Appeals of New York would later uphold the ordinance as a valid exercise of the government’s police power.⁶⁸ Indeed, soon New York City’s new single use zoning scheme would become a model for cities throughout the United States, with over 550 municipalities adopting zoning ordinances within the next ten years.⁶⁹ One high profile example was found with the City of Milwaukee which followed the New York City model in 1920 and adopted its first comprehensive zoning ordinance—one that was later upheld by the Wisconsin Supreme Court as constituting a valid exercise of the municipality’s police power.⁷⁰ In fact, by 1919, ten states—as well as Congress on behalf of the District of Columbia—had passed enabling legislation allowing select cities to adopt zoning ordinances, primarily oriented toward the regulation of separated, single uses.⁷¹

⁶² Robert C. Greenstreet, *The Impact of Building Codes and Legislation Upon the Development of Tall Buildings*, at <http://architronic.saed.kent.edu/v5n2/v5n2.03.html#ref26> (last visited Jan. 21, 2006). At the time, the desire for allowing sunlight to reach the street level was not simply aesthetic but, rather, was believed necessary to allow the sunlight to kill sidewalk-borne diseases. *Id.*

⁶³ New York City Department of City Planning Zoning History, at <http://www.nyc.gov/html/dcp/html/zone/zonehis.html>

⁶⁴ *Supra* note 14.

⁶⁵ *Supra* note 16.

⁶⁶ *Id.*

⁶⁷ *Lincoln Trust Co. v. Williams Building Corporation*, 128 N.E. 209 (N.Y. 1920).

⁶⁸ *Id.*

⁶⁹ JUERGENSMEYER & ROBRTS , *supra* note 56, at 24.

⁷⁰ *State v. Harper*, 196 N.W. 451, 452 (Wis. 1923).

⁷¹ Stuart Meck, *Model Planning and Zoning Enabling Legislation: A Short History*, MODERNIZING STATE PLANNING STATUTES, THE GROWING SMART WORKING PAPERS 1, available at <http://www.planning.org/growingsmart/pdf/PAS462.pdf>.

With this rapidly increasing interest by states in permitting municipal zoning, the United States Department of Commerce would soon use the 1916 New York City zoning ordinance as the framework for the Standard Zoning Enabling Act—a model statute that it developed as a template for zoning (including the single use zone system) throughout the country.⁷² In doing so, the federal government would take the first of two major steps toward cementing single use zoning as the predominant legal scheme for regulating land control in the United States.

B. The Legislative Approval of Single Use Zoning: the Standard Zoning Enabling Act

In 1924, the Department of Commerce, under then-Secretary Herbert Hoover developed a new model law entitled *A Standard State Zoning Enabling Act Under Which Municipalities Can Adopt Zoning Regulations* (hereinafter the “SZE”).⁷³ This model statute would ultimately serve as the framework for the widespread state adoption of zoning enabling laws that both expressly and implicitly encouraged a single use regulatory system. To understand how this occurred, one must look at how the SZE came into being.

1. The Historical Background of the SZE

Secretary Hoover’s interest in land use controls resulted from his dual desire to use government regulation to encourage policies that advanced business interests while also providing for the less-privileged.⁷⁴ To further this goal, Secretary Hoover created a new division within the Department of Commerce’s National Bureau of Standards known as the Division of Building and Housing.⁷⁵ Hoover charged this new division with determining how to promote zoning as a land use control.⁷⁶

Secretary Hoover also created the Advisory Committee on Zoning (later renamed the Advisory Committee on City Planning and Zoning)(hereinafter the “ACCPZ”) and, as one of it’s primary responsibilities, assigned the ACCPZ with developing a model state zoning enabling act—ultimately to be known as the SZE.⁷⁷ In essence, the ACCPZ

⁷² One of the most obvious examples of this is the Standard State Zoning Enabling Acts’ acknowledgement that the Act is intended to, among other things, “provide adequate light and air”—one of the leadings reasons that New York City enacted the 1916 zoning act. STANDARD ZONING ENABLING ACT §3 (1926), available at <http://planning.org/growingsmart.enablingacts.htm> (last visited Jan. 21, 2006).

⁷³ *Id.*

⁷⁴ Ruth Knack et.al., *The Real Story Behind the Standard Planning and Zoning Acts of the 1920s*, LAND USE LAW & ZONING DIGEST, Feb. 1996, at 3. Secretary Hoover’s keen interest in zoning and planning was demonstrated by his belief that the “lack of adequate open spaces, of playgrounds and parks, the congestion of streets, the misery of tenement life and its repercussions upon each new generation, are an untold charge against our American life.” Robert K. Murry, *Herbert Hoover and the Harding Cabinet*, in HERBERT HOOVER AS SECRETARY OF COMMERCE: STUDIES IN NEW ERA THOUGHT AND PRACTICE 94 (E. Hawley ed., 1974).

⁷⁵ Knack, *supra* note 75, at 3.

⁷⁶ *Id.*

⁷⁷ *Id.*

resulted from the government's belief that, as an increasing number of states were individually adopting zoning enabling legislation at the time, the promulgation of a uniform and consistent national model zoning "framework" would serve as a strong overall defense against court scrutiny.⁷⁸

To help draft the actual SZEA, Secretary Hoover looked to Edward M. Bassett, a New York attorney who had earlier chaired the committee that developed New York City's first comprehensive zoning ordinance.⁷⁹ By appointing Bassett, Secretary Hoover ensured that the SZEA would be heavily influenced by the 1916 New York City ordinance. And, with Mr. Bassett taking a lead role, the ACCPZ would in 1922 publish an initial draft of the SZEA followed by a printed first edition in 1924 and a second edition in 1926.⁸⁰

2. The Single Use Zoning Structure of the SZEA

Upon its completion, the SZEA essentially established a two-step process for municipalities to implement use-based zoning systems. First, Section 1 of the SZEA, under the auspices of a state's general police powers, permitted the "legislative body of cities and incorporated villages" to regulate "the location *and use* of buildings, structures, and land for trade, industry, residence, and other purposes."⁸¹

Section 2 then authorized the local jurisdiction to divide the municipality into "districts" that correspond to the types of regulated land uses.⁸² Notably absent in either section was language contemplating a mix of uses within the same building or even within the same district.

The language of Section 3 specifically outlined reasons why a use-based zoning system was important. These included:

to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, park, and other public requirements.⁸³

Interestingly, the effectiveness of single use zoning in accomplishing these goals has either been obviated by technological advances or have been shown to be more effectively realized through traditional town planning principles than single use zoning—after all, advanced sewage systems and fire controls have by and large mitigated the

⁷⁸ *Id.*

⁷⁹ *Id.* at 4.

⁸⁰ Meck, *supra* note 72, at 1.

⁸¹ STANDARD ZONING ENABLING ACT §1(emphasis added). Commentators generally agree that the term "land for trade" is synonymous with the term "commercial development" in today's zoning regulations. DANIEL R. MANDELKER, LAND USE LAW 4-14 (Michie, 5th ed., 2003).

⁸² STANDARD ZONING ENABLING ACT §2.

⁸³ STANDARD ZONING ENABLING ACT § 3.

disease risks and fire dangers faced by early American urban centers.⁸⁴ Nevertheless, the SZEA's significant influence on municipal zoning schemes throughout the country cannot be understated as, by 1930, 35 states had adopted some variation of it.⁸⁵ This number would later increase to 50 with all states eventually adopting a version of the SZEA⁸⁶

The reason for the SZEA's popularity was simple: separated, single use zoning appeared at the time to be an effective tool against the pollution, fire, and disease problems faced by some of the larger urban areas of the time because it isolated residential uses from the more polluting and fire-prone industrial uses.⁸⁷ The strict separation of uses by single use zoning was, therefore, a logical response to certain problems of that time.

The SZEA's popularity was also driven by the fact that it essentially provided states across the country with a standardized legal template for adopting single use zoning as a way to promote public health, safety, and welfare—one which came directly from the United States Department of Commerce.

C. The Judicial Approval of Single Use Zoning: *Village of Euclid v. Ambler Realty Co.*

Whereas the SZEA provided a standard, easy way to implement a model enabling act that encouraged separated, single use zoning, in *Village of Euclid v. Ambler Realty Co.*⁸⁸, the United States Supreme Court provided another key piece to its ultimate widespread adoption, namely, judicial approval for using this new type of land regulation.

1. The Historical Background of *Euclid*

On November 13, 1922, the Village of Euclid, Ohio—a suburb near Cleveland—embraced the growing trend of separated, single use zoning when it passed an ordinance creating a new use-based zoning plan.⁸⁹ The ordinance delineated uses by categories U-1 through U-6.⁹⁰ The system was designed to limit development in the highest district to only those uses specifically approved for that district.⁹¹ Meanwhile, the ordinance permitted land located in districts below the highest use to also be developed pursuant to

⁸⁴ See JUERGENSMEYER & ROBERTS, *supra* note 55, at 18. “The typical American city, by the 1840’s, was characterized by filth, stench and stagnant water in the streets, backyard privies, dampness, and the absence of sunlight in residential space.” *Id.*

⁸⁵ Norman L. Knauss, Division of Building and Housing, U.S. Bureau of Standards, U.S. Department of Commerce, *Zoning Progress in the United States, Zoning Legislation in the United States 2* (April 1930). (April 1930).

⁸⁶ NORMAN WILLIAMS, *AMERICAN LAND PLANNING LAW* 461 (Clark Boardman Callaghan, 1988).

Although it should be noted that, eventually, the number of states would be reduced to 47 as Kentucky, Vermont, and Pennsylvania would eventually drop the SZEA. *Id.*

⁸⁷ *Supra* note 84.

⁸⁸ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

the use permitted in the higher use districts.⁹² Thus, within a U-3 district, the specifically permitted uses of that district—as well as the permitted uses of U-1 and U-2 (higher use districts)—were permissible by right—today commonly referred to as cumulative zoning.⁹³

After its adoption, the Ambler Realty Company filed a lawsuit challenging the ordinance as applied to a 68-acre tract of land owned by Ambler Realty on the western end of the village.⁹⁴ The tract adjoined residential areas on the east and west side.⁹⁵

Ambler Realty contended that the new zoning ordinance violated the Fourteenth Amendment of the Federal Constitution “in that it deprives appellee of liberty and property without due process of law and denies to it the equal protection of the law, and that it offends against certain provisions of the Constitution of the state of Ohio.”⁹⁶ As a basis for this contention, Ambler Realty argued that the land at issue was now worth a considerable amount less due to the new ordinance’s restrictions on permissible uses for that land.⁹⁷

In addition, Ambler Realty also argued that the ordinance “attempts to restrict and control the lawful uses of appellee’s land, so as to confiscate and destroy a great part of its value;” and that it results in “diverting normal industrial, commercial, and residential development thereof to other and less favorable locations.”⁹⁸ As a result, Ambler Realty asked for an injunction that would restrain the village from enforcing the ordinance as applied to Ambler Realty’s property.⁹⁹

2. The *Euclid* Court’s Approval of Single Use Zoning

While zoning as a regulatory tool is today taken for granted, at the time *Euclid* was decided, zoning remained a relatively nascent concept. Indeed, the *Euclid* court recognized that zoning ordinances represented a new regulatory paradigm, one that in prior years might well have not passed Constitutional muster:

[Zoning] Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.¹⁰⁰

⁹² *Id.*

⁹³ Today, this zoning system is common throughout the United States and is often characterized as a pyramid vertically divided into use zones (similar to the USDA food pyramid) in which a use at the higher end of the pyramid is always permitted as one proceeds downward through the use zones at the top of the pyramid (“higher uses”) to the bottom use zones (“lower uses”). See Juergensmeyer & Roberts, *supra* note 56.

⁹⁴ *Euclid*, 272 U.S. at 379.

⁹⁵ *Id.*

⁹⁶ *Id.* at 384.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 387.

Even so, the Court recognized that lower courts had increasingly sustained zoning regulations during that time due to the "complex conditions" that resulted from an increasingly industrialized nation.¹⁰¹ The Court analogized this trend to the growing use of traffic regulations that, prior to automobiles and streetcar systems, would likely have been viewed just as egregiously as zoning regulations would have been prior to industrialization, especially industrialization in the nation's urban areas.¹⁰²

The *Euclid* Court opined that, in order to survive judicial scrutiny, zoning regulations must arise from a municipality's police power to protect the public safety, health, and general welfare.¹⁰³ Interestingly though, even while upholding zoning as a permissible regulatory tool, the Court suggested that use-based zoning, even if permissible in urban areas, might still be impermissible in rural areas.¹⁰⁴ And, in this respect, the *Euclid* Court curiously incorporated a decidedly transect-oriented statement into its analysis of use-based zoning:

Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use...is to be determined, **not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality**...A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.¹⁰⁵

Moreover, the Court also recognized that the Village of Euclid zoning ordinance, by separating *all* industrial uses rather than simply those found to be incompatible with residential uses, would inevitably end up segregating some industrial uses that themselves were not a nuisance vis-à-vis their proximity to residential uses.¹⁰⁶ Yet, even while recognizing this inherent problem with strictly separated, single use zoning, the Court did not face it head-on but instead offered only the legally specious proclamation that "the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation."¹⁰⁷

In other words, the judicial equivalent of "*fixing this inequity would be too tough, so tough luck.*"

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Euclid*, 272 U.S. at 388 (emphasis added).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 389.

Unfortunately, by failing to demand more precise (and, thus, more equitable) results, the *Euclid* Court tacitly approved the laziness in planning and zoning that separated, single use zoning promotes—and that the SmartCode is specifically designed to counter.¹⁰⁸

Indeed, the *Euclid* Court was perceptive enough to realize that, while prohibiting industrial uses from mixing with residential use zones was defensible under the framework of the municipality's general welfare police power, a much more demanding question would inevitably arise. That is, what to do when a zoning ordinance (such as the one adopted by the Village of Euclid) also excluded "business and trade of every sort, including hotels and apartment houses..." from residential districts and, whether doing so constitutes a taking.¹⁰⁹

In surveying the state of the law on that issue, the *Euclid* Court recognized a lack of lower court consensus.¹¹⁰ However, it also noted that the increasing trend seemed to be toward permitting ordinances that, in addition to segregating industrial uses from residential uses, also segregated non-industrial commercial uses from residential uses.¹¹¹ Ultimately, the *Euclid* Court went with the trend and, in doing so, seemed especially persuaded by two arguments in support of this trend. First, the Court agreed with a line of cases which held that an ordinance that separates land uses is valid because it "bears a rational relation to the health and safety of the community."¹¹² The Court relied upon several grounds in support of this broad proposition. These included:

1. "[P]romotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry."¹¹³
2. "[S]uppression and prevention of disorder"¹¹⁴
3. "[F]acilitating the extinguishment of fires"¹¹⁵
4. "[T]he enforcement of street traffic regulations and other general welfare ordinances"¹¹⁶
5. "[A]iding the health and safety of the community, by excluding from residential areas the confusion and danger of fire, contagion, and disorder, which in greater or less degree attach to the location of stores, shops, and factories."¹¹⁷

¹⁰⁸ Possibly recognizing the readily apparent lack of vigor that this approach lends to equity, the Court did offer the vague (and, likely, indeterminable) assurance that "[i]t is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way." *Id.* at 390. Might this be the language upon which proponents of dismantling the increasingly damaging system of use-based zoning and replacing it with a transect-based one, even if today's municipalities continue to resist such a change?

¹⁰⁹ *Id.* at 390.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 390-391.

¹¹² *Euclid*, 272 U.S. at 391.

¹¹³ *Id.* Curiously though, the *Euclid* Court somehow concluded that apartment houses apparently do not fall within its definition of a dwelling house as the Court was content with allowing the children (and others) who lived in apartments to exist in the apparent security-lacking and health-endangering commercial zones that it seemed so concerned about segregating from dwelling houses. *Id.* at 394.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

The *Euclid* Court also found persuasive reasoning from the previous cases that upheld separated, single use zoning because, purportedly, "the construction and repair of streets may be rendered easier and less expensive, by confining the greater part of the heavy traffic to the streets where business is carried on."¹¹⁸

While some of these dangers were indeed a problem in many urban areas (and, therefore were appropriate matters for exercising the general welfare police power), the Court's reliance on these grounds as an across-the-board rationale, while simple and convenient, bears little relation to the actual built environment.

In particular, even though a chemical factory or meat-packing plant directly adjacent to a residential area might indeed exacerbate some of these dangers, it is hard to imagine how a typical corner sundry store, a barber shop, or the offices of a lawyer, accountant, or other professional would similarly exacerbate these risks. Indeed, of all the grounds relied upon by the Court, none seem to provide any legitimate justification for legislatively segregating office and business establishments from residential dwellings. Yet, that is the practical effect of the *Euclid* decision which essentially upheld broad separated single use zoning regardless of whether some of the separated uses were entirely compatible with, if not beneficial to, residential uses.

In the end, the *Euclid* Court decided that parsing the Constitutionality of separating all other uses from residential districts was too much of a challenge for it to tackle. As a result, the reality that single use zoning would become the predominant regulatory approach was assured in many respects. Indeed, it would not be until several decades later that concerted efforts to reverse this reality would materialize.

V. Efforts to Restore the Legality of Traditional Planning Principles

There is a some belief among various proponents of traditional town planning that the worst sprawl and unsustainable growth patterns in this country resulted from several post World War II policy shifts that promoted a policy of constructing new residential developments rather than renovating existing housing stock.¹¹⁹ This belief is often based on post war housing legislation such as the 1944 Servicemen's Readjustment Act (GI Bill)¹²⁰ that created a home financing system in which new suburban construction was prioritized over the renovation and rehabilitation of the existing built environment.¹²¹ It is also commonly based on post war transportation legislation such as the 1944 Federal Aid Highway Act¹²² and the 1956 Interstate Highway Act¹²³ that served to promote and

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ SUBURBAN NATION, *supra* note 3, at 234.

¹²⁰ Servicemen's Readjustment Act of 1944, Pub. L. No. 346, 58 Stat. 284 (codified as amended in scattered sections of 38 U.S.C.).

¹²¹ *Where Do We Go From Here? Smart Growth and Choices for Change*, at http://www.nbm.org/Exhibits/past/2000_1996/Where_Do_We_Go_Script.html (April 20, 1999) [hereinafter *Where Do We Go From Here?*].

¹²² Federal Aid Highway Act of 1944, 58 Stat. 838 (in scattered sections of 23 U.S.C.).

finance extensive road networks composed of radial highways, designed to transport large volumes of vehicular travel from urban centers to peripheral suburbs, and beltways designed to transport vehicular travel around the periphery of existing cities—both of which undermined the traditional town planning principle of an interconnected street network.¹²⁴

However, even prior to World War II, a variety of federal initiatives served to incentivize the type of unsustainable sprawl that, when combined with the SZEAs and *Euclid's* implicit support of separated, single use zoning, would nearly kill the prospects of using traditional planning principles in developing new communities and redeveloping existing communities.

Examples of these sprawl-inducing initiatives included:

a) The 1931 President's Conference on Home Building and Home Ownership, a gathering of over 1000 participants called together to consider national housing policy—one in which the participants concluded, among other things, that:

- 1) “[t]he next great lift in elevating the living conditions of the American family must come from a concerted and nationwide movement to provide new and better homes,”
- 2) “More industries should move to the country, where workers may have better home surroundings”; and,
- 3) Rural homes can be made as beautiful and convenient as city homes.”¹²⁵

b) The 1933 Home Owners Loan Corporation and The 1934 National Housing Act¹²⁶, which ultimately ended up creating a system where new, suburban single-family detached housing was given preferential loan treatment.¹²⁷ As one commentator has noted, these initiatives:

[E]ncouraged home ownership by introducing a low-interest, long-term, fully amortized loan with uniform payments over the life of the debt. These policies did not apply evenly to all housing types but favored the development of new single family detached housing at a distance away from the urban core. On the other hand, more urban housing types such as multi-family homes or improvements on existing homes were left

¹²³ Interstate Highway Act of 1956, 23 U.S.C. §§101-512 (1956).

¹²⁴ *Where Do We Go From Here?*, *supra* note 124.

¹²⁵ John M. Cries & James Ford, *Publications of the President's Conference on Home Building and Home Ownership: Final Reports of Committees*, at

<http://ocp.hul.harvard.edu/www/hollislink.html?subject=housing> (Dan H. Wheeler & Blanche Halbert eds.) (last visited Jan. 22, 2006). To be fair though, while the committee's conclusions leaned decidedly toward new suburban single use construction, it did provide some recognition of the value of the existing built environment: “Old homes should be modernized for the sake of health and convenience.” *Id.*

¹²⁶ National Housing Act of 1934, 48 Stat. 1246 (codified as amended in 12 U.S.C.A.).

¹²⁷ *Where Do We Go From Here?*, *supra* note 124.

unfunded, and there was a disinvestment in inner city neighborhoods as potential home owners moved to the suburbs to take advantage of the available assistance.¹²⁸

c) The 1935 FHA Building Codes which, among other things, prompted builders to prioritize new home construction over renovated home construction, because the standards “make it more profitable for builders to invest in new construction, rather than improve existing structures.”¹²⁹

d) The 1938 FHA Underwriting Manual which served to substantially mitigate the risk for the builders of new homes (and, thus, promote their development) through a system in which the FHA assured certain, qualified bank lenders that, if new housing comported to FHA standards, then the FHA would “conditionally commit” to insure most mortgages within a new home subdivision.¹³⁰

The cumulative result of these type initiatives was a national housing policy geared toward single use, new suburban development—one that, by its very nature, required an increasing consumption of peripherally located land. And, when combined with the victorious conclusion of World War II—with its numerous returning soldiers and a war manufacturing machine in need of building other new products now that the constant demand for new military equipment was winding down, it was hardly surprising that the primacy of the new single use suburban development would become a foregone conclusion.¹³¹

A. Early Indications that Single Use Euclidean Zoning Would Render Traditional Planning Techniques Illegal

While the new, single use, suburban subdivision was increasingly glamorized in the mid-1900s as a highly desirable and improved lifestyle, as this new form of development grew, researchers soon began to discover that this development pattern was becoming increasingly inefficient as demonstrated by studies that began to reveal the true negative costs associated with separated, single use zoning.¹³² Indeed, as early as 1964, one leading planner suggested that zoning had outlived its usefulness and issued a “requiem” calling for its abandonment.¹³³

128 *Transportation Planning and Energy 2*, at www.dot.ca.gov/hq/tpp/offices/opar/Transportation%20Energy%20Study%20Report/KIPOP%20Ch8%20ask%203.4.doc.

¹²⁹ *Where Do We Go From Here?*, *supra* note 124.

¹³⁰ *Id.*

¹³¹ For an excellent summary of other events leading to today’s unsustainable growth patterns, *see* Todd Bressi, *Planning the American Dream*, in *THE NEW URBANISM* xxv-xlii (Peter Katz 1993).

¹³² Patricia Burgess, *Revisiting Sprawl: Lessons from the Past*, at <http://cua6.csuohio.edu/~ucweb/pubs/resprawl.pdf> (last visited Jan. 18, 2006).

¹³³ John Reps, *Pomeroy Memorial Lecture: Requiem for Zoning*, Lecture at the American Society of Planning Officials (1964).

Then, in the mid-1970s, the Real Estate Research Corporation conducted one of the most influential studies covering the negative effects of sprawl and the zoning techniques that instigated it.¹³⁴ This study focused on the actual costs of sprawl—within an economic and social context—while paying particular emphasis on “leap-frog” development, a form of development where builders bypassed (or “leap-frogged”) more expensive, and generally more strictly regulated interior land, in order to develop cheaper, and generally less regulated, land on the suburban fringes.¹³⁵

Around this same time, a progressive-minded landscape architect named Ian McHarg published *Design with Nature* which, in addition to re-considering how an ecological transect might be synced with development patterns, focused at great lengths on how the built environment should be constructed in coordination with environmental patterns.¹³⁶ This, as opposed to the environment simply being subjugated to the desires of development—a problem which was increasingly becoming the case at that time with suburban developments consuming vast amounts of farmland, forest land, and other natural environments.

In total, these varied events evidenced a growing concern that the development system most conducive to separated, single use zoning was, in actuality, creating an unsustainable growth pattern for the built environment. Soon efforts would be commenced—to varying degrees of success—to solve these problems. The next section examines several of those.

B. Early Efforts to Legally Enable Traditional Planning Principles

With the problems identified, proponents of traditional planning techniques began to look for alternative development tools that could facilitate the use of these techniques—some of which (such as the mixing of uses) had been made illegal by existing zoning codes. While this process would ultimately lead to the highly effective transect-based approach on which the SmartCode is based, several preliminary tools would first be used in attempts to legalize that, which had traditionally been deemed successful.

1. Planned Unit Development Ordinances

As an increasing number of observers began to realize that Euclidean, single use zoning led to unsustainable communities, municipalities began to develop new zoning tools to mitigate the strict separation of uses enforced by Euclidean zoning. One such tool was the Planned Unit Development (PUD) ordinance.

¹³⁴ REAL ESTATE RESEARCH CORP. FOR THE COUNCIL ON ENVTL. QUALITY, DEPT. OF HOUSING & URB. DEV., *The Costs of Sprawl: Environmental and Economic Costs of Alternative Residential Development Patterns at the Urban Fringe*, (1974).

¹³⁵ Burgess, *supra* note 136.

¹³⁶ IAN MCHARG, *DESIGN WITH NATURE*, (Natural History Press, 1969).

The concept of PUDs came about in 1925 with a section of Bassett’s Model Planning Enabling Act of 1925.¹³⁷ However, it was not until the 1960s that municipalities began to adopt—and developers began to widely use –PUDs.¹³⁸

PUDs provide an alternative to separated, single use zoning by allowing for the development of land in a way “that does not fit into all the use, bulk, and open space requirements of any of the standard zoning districts.”¹³⁹ Cited objectives of planned unit developments include:

“(1) to achieve flexibility; (2) to produce a more desirable living environment; (3) to encourage developers to use a more creative approach in their development of land; (4) to encourage a more efficient and more desirable use of open land; and (5) to encourage variety in the physical development pattern in the city.”¹⁴⁰

PUDs allow for an extended range of flexibility because the land is regulated as one land unit rather than the units being regulated individually.¹⁴¹ And, unlike Euclidean use-based zoning, PUDs often allow for the incorporation of mixed uses in one unit of land.¹⁴²

PUDs further differ from separated, single use zoning in several other respects.¹⁴³ For example, PUDs are generally not subjected to as strict of a development approval process as Euclidean zoning.¹⁴⁴ Moreover, PUDs can be implemented in several different formats such as a “floating zone, an overlay zone, a separate zoning district, or as part of a subdivision ordinance.”¹⁴⁵

Yet, despite being structured to allow for the use of more traditional town planning techniques, PUDs still did not provide a strong alternative to Euclidean zoning primarily because, by being subject to negotiation on a case-by-case basis, they are prone to lacking uniformity among the varying PUD projects—a fact that runs afoul to the common statutory requirement that zoning must be uniformly applied.

2. Alternative Zoning Ordinances

Even with PUD ordinances as an option, traditional planning principles—while arguably more likely to be legally-permitted under PUDs—still remained relatively unused. This would begin to change in the early 1980s.

¹³⁷ MCHARG, *supra* note 140, at 289.

¹³⁸ *Id.*

¹³⁹ See www.smartgrowth.org (last visited Jan. 22, 2006).

¹⁴⁰ Frankland v. City of Lake Oswego, 517 P. 2d 1042, 1047 (Or. 1973).

¹⁴¹ See www.smartgrowth.org.

¹⁴² JUERGENSMEYER & ROBERTS, *supra* note 56, at 288.

¹⁴³ Brian W. Ohm & Robert J. Sitkowski, *The Influence of New Urbanism on Local Ordinances: The Twilight of Zoning*, 35 Urb. Law 783, 785 (2003).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

a. The Rediscovery of Traditional Town Planning Principles

While a seminal event in the revival of traditional planning techniques, the Ahwahnee conference in 1991 certainly was the not beginning of this revival. Indeed, during the 1970s, architects and planners began to rediscover traditional town planning (sometimes referred to as traditional *urban* planning) techniques.¹⁴⁶ While this rediscovery cannot be traced to a single source or locale, its development was especially strong in South Florida where a collection of "New Urbanists" were attracted by a strong building market and the University of Miami School of Architecture which was leading an effort to re-focus on the overall design of a community rather than the single design of a building.¹⁴⁷

In addition, two other factors encouraging the rediscovery of traditional town planning and design principles converged on South Florida around that time: 1) the Architecture Club of Miami's speaker series which included speakers who advocated designing communities in the aggregate instead of buildings in the isolation and 2) the proximity of two towns that had, at least partially, been planned according to traditional planning principles, namely, Key West and Coral Gables.¹⁴⁸

It was not surprising then that, as the 1970s progressed, this rediscovery of traditional planning and design techniques began to work its way into actual projects to varying degrees. One example was Miami Lakes.¹⁴⁹ Founded in the early 1960s, Miami Lakes is a master planned community that, while conventional in many respects, did utilize certain traditional planning techniques such as interconnected streets and a Main Street-like commercial core.¹⁵⁰ Indeed, Victor Dover, one of the early South Florida New Urbanists acknowledged the Miami Lakes commercial core as an early example of restored urbanism.¹⁵¹ However, even while pointing to some of the traditional features of Miami Lakes, the early New Urbanists recognized a burgeoning legal disconnect: Miami Lakes

¹⁴⁶ Jean Scott, *An Overview of New Urbanism in South Florida*, at www.cnuflorida.org/nu_florida/south_florida.htm (last visited Jan. 22, 2006).

¹⁴⁷ *Id.* at 2. While the interest among South Florida practitioners in restoring traditional town planning techniques was strong, the interest was not exclusive to that area. Indeed, another leading proponent of this issue was California architect Peter Calthorpe who, around this same time, was beginning to advocate a return to traditional planning techniques with a heavy emphasis on incorporating public transit options into these projects. See James Moore, *The Birth and Flowering of New Urbanism*, at <http://sustainable.state.fl.us/fdi/fsc/news/local/nurban2.htm> (July 4, 1998). Ultimately both his ideas and the ideas of the South Florida practitioners maintained much in common. *Id.* at 3.

¹⁴⁸ Scott, *supra* note 151, at 2. One of the Architecture Club of Miami speakers was Leon Krier whose planning theory would end up having a strong influence on the development of Seaside and the work of New Urbanists in general. See Ruth Eckdish Knack, *Repent, Ye Sinners, Repent*, PLANNING MAGAZINE, available at <http://www.planning.org/25anniversary/planning/1989aug.htm> (August 1989) [hereinafter *Repent*]. Another seminal event was the release of an urban design study by the firm of Venturi, Rauch, and Scott-Brown for Miami Beach that recognized the value of traditional planning and design in restoring this now vibrant, but once downtrodden area. *Repent*, *supra* note 153 at 3.

¹⁴⁹ Scott, *supra* note 151, at 4.

¹⁵⁰ *Repent*, *supra* note 153.

¹⁵¹ Scott, *supra* note 151, at 4.

could not be developed by right under existing zoning laws but rather would require variances to incorporate its traditionally planned components.¹⁵²

Ultimately, many of these varied lessons were incorporated into the early new urban-oriented project, Charleston Place in Boca Raton, Florida.¹⁵³ Designed by one of the earliest South Florida New Urban practitioners, (the Duany, Plater-Zyberk & Company firm headed by Andres Duany and Elizabeth Plater-Zyberk), the construction of Charleston Place commenced around 1980.¹⁵⁴ Taking much of its cue from the row houses and sideyard houses of Charleston, South Carolina, this project demonstrated the advantages of mixing building types—in that case, residential types—to develop a more cohesive whole.¹⁵⁵ Still though, at its very core, Charleston Place was essentially limited to residential uses.¹⁵⁶ Thus, while an important step forward, it still did not evidence the varied uses of a complete town or neighborhood.

This would soon change though as Charleston Place was planned just a few years before what is often considered to be the project that brought the rediscovery of traditional planning principles into the mainstream. This project, Seaside in Walton County, Florida, was also planned by the Duany, Plater-Zyberk firm using traditional techniques.¹⁵⁷ One of the most forward-looking aspects of Seaside was that the planners not only utilized traditional planning techniques but also attempted to codify those principles specific to that development.¹⁵⁸ The resulting one page regulating code was unique both in its short length and its goal of legally defining the development in terms of traditional planning and design.

The success of Seaside quickly spurred interest in the use of traditional planning techniques. However, the reality remained that these techniques were still illegal under most conventional zoning laws.

b. The Traditional Neighborhood Development Ordinance

In 1987, one of the first efforts to create a municipal ordinance legalizing traditional planning techniques was initiated as part of a Duany, Plater-Zyberk project in Bedford, New Hampshire.¹⁵⁹ Referred to as a Traditional Neighborhood Development Ordinance ("TND Ordinance"), this new regulatory approach was initially not approved, but after several changes, was eventually adopted by the municipality.¹⁶⁰

The TND Ordinance itself was actually a predecessor to the SmartCode. The ordinance sought to enable a regulatory framework where “new growth is modeled on the old

¹⁵² *Repent, supra* note 153.

¹⁵³ Scott, *supra* note 151, at 4.

¹⁵⁴ *Id.*

¹⁵⁵ LANGDON, *supra* note 43, at 116.

¹⁵⁶ *Id.* at 118. “Charleston Place, for all its virtues, was only a housing subdivision” *Id.*

¹⁵⁷ Moore, *supra* note 152, at 1.

¹⁵⁸ *Repent, supra* note 153.

¹⁵⁹ SUBURBAN NATION, *supra* note 3, at 222 n.2.

¹⁶⁰ *Id.*

patterns that people cherish.”¹⁶¹ While the TND Ordinance was loosely derived from the legal precedent of PUD ordinances, it differed greatly in result by dictating what could be built rather than simply allowing those terms to be negotiated on a case-by case basis.¹⁶²

Realizing that legalizing traditional planning principles on the municipal level would quickly facilitate their larger scale use, several early practitioners then organized the Foundation for Traditional Neighborhoods in 1989.¹⁶³ The organization was charged with developing a model TND Ordinance for use on a national scale and ultimately did so—beginning with several high profile efforts such as a TND Ordinance for Dade County, Florida.¹⁶⁴ This code, the first TND version to be adopted on a countywide scale, while certainly a well-reasoned and formulated effort to allow the use of traditional planning techniques by right, still met with mixed reviews.¹⁶⁵

For example, while agreeing that its statement of intent—to de-emphasize vehicular travel and re-emphasize pedestrian travel—was a highly positive goal, one planner noted the ordinance’s somewhat conventional parking requirements, vague sign controls, total prohibition of mobile homes, and handling of industrial uses as either incomplete or unrealistic.¹⁶⁶ Even so, most of these concerns remained technical in nature with the ordinance’s overall effect of legalizing the use of traditional town planning techniques by right resulting in its citation as a potentially powerful new developmental code.¹⁶⁷

While other municipalities would ultimately consider TND Ordinances, soon a group of New Urbanists led by Andres Duany would incorporate the concept of the transect into a new model ordinance that, like the TND Ordinance, would enable the use of traditional town planning techniques by right but one that would also seek to implement these techniques within the larger transect system.

VI. Why the SmartCode is the Best Tool for Legalizing Traditional Planning Techniques

In the big picture, form-based zoning codes alone are certainly an improvement over separated, single use-based codes because form-based codes permit developers to begin utilizing traditional planning techniques on a building, block and even neighborhood scale as a matter of right. However, the SmartCode’s incorporation of the transect tool, in addition to its form-based structure, results in the best overall method for legalizing these techniques on a municipality-wide and region-wide scale. Significantly though, the SmartCode is not an effective tool simply because it is transect-based. Instead, the SmartCode’s strategic use of textual and graphic coding—divided by the appropriate scale of the effort—also makes it a highly intuitive tool.

¹⁶¹ *Id.* at 223.

¹⁶² Bressi, *Planning the American Dream*, in *THE NEW URBANISM*, *supra* note 134, at xxxvii.

¹⁶³ *Repent*, *supra* note 153.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Repent*, *supra* note 153.

A. The Benefits of the SmartCode's Intuitively Organized Structure

The SmartCode enables communities to utilize traditional town planning methods by eliminating legal hurdles inherent in conventional Euclidean codes that prevent the use of these methods. One of the first legal hurdles that the SmartCode eliminates is the need to obtain special zoning concessions (such as variances or PUDs) to build traditional neighborhoods--as is almost always required under conventional, single use codes. Instead, the SmartCode permits traditional neighborhoods as a matter of right, thus eliminating the disincentive of requiring rezoning and variance applications just to build the very same type towns such as Alexandria, Virginia or Charleston, South Carolina that many people today view as best practices in planning.

Stated differently, the SmartCode levels the playing field by providing developers the legal right to use traditional town planning techniques. The importance of this right is clearly evident in instances where developers have sought to utilize traditional town planning methods but have been forced to resort to rezoning into a PUD-like zone just to develop a sustainable-modeled project.

Take for example the traditional neighborhood development in the Town of Mt. Pleasant, South Carolina known as I'On.¹⁶⁸ While today an award-winning project, I'On's development was originally marred by a legal challenge that demonstrates how conventional zoning codes can impede the use of traditional town planning techniques by not allowing developers to use these techniques as a matter of right.¹⁶⁹

In the case of I'On, the developers had acquired a 243-acre tract in Mt. Pleasant.¹⁷⁰ After acquiring this land, the developers filed an application with the Mt. Pleasant Board of Planning and Zoning seeking to have the land rezoned from single family residential to planned development (South Carolina's equivalent of a PUD).¹⁷¹ This rezoning was necessary because Mt. Pleasant's conventional separated, single use zoning code would not allow the developers to utilize traditional town planning techniques, such as mixing uses, in creating I'On.¹⁷²

While Mt. Pleasant's Board of Planning and Zoning approved the rezoning, following a fierce campaign by a small yet determined opposition effort¹⁷³, the Town Council denied the rezoning request by a 5 to 4 vote.¹⁷⁴ The practical effect of the denial was that the developer's vision of a pedestrian-friendly, traditional neighborhood of mixed uses could not be built on the tract since Mt. Pleasant's conventional separated, single use code prevented as much.¹⁷⁵ However, rather than abandon the attempt to create a traditional neighborhood, the developer resubmitted a second (slightly modified) rezoning

¹⁶⁸ See www.ionvillage.com.

¹⁶⁹ I'On, L.L.C. v. Town of Mt. Pleasant, 526 S.E.2d 716 (S.C. 2000).

¹⁷⁰ *Id.* at 717.

¹⁷¹ *Id.* at 718.

¹⁷² *Id.*

¹⁷³ I'On, 526 S.E. 2d at 718.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

application that still sought planned development zoning.¹⁷⁶ The Planning and Zoning Board also approved the second application and, this time, the Town Council did the same.¹⁷⁷

Soon thereafter, residents of Mt. Pleasant initiated a petition drive that sought to have the tract's single family residential zoning restored or, in the alternative, to hold a referendum in which the citizens of Mt. Pleasant could decide the proper zoning of that tract.¹⁷⁸ Ultimately, the petition obtained the number of signatures required by law and a referendum was scheduled for November 1997.¹⁷⁹ However, before the referendum could be held, the developer filed suit seeking declaratory judgment that zoning by referendum was not permitted under South Carolina law.¹⁸⁰ Ultimately, both the trial court and South Carolina Supreme Court agreed that South Carolina did not permit zoning by referendum.¹⁸¹

Yet, even though they eventually won, and I'On today is thriving as a traditional neighborhood, the very fact that the developer was forced to spend nearly 3 years litigating just to obtain the right to use traditional town planning techniques demonstrates how today's conventional, Euclidean codes serve as significant legal roadblocks to the creation of traditional, mixed-use and pedestrian-friendly neighborhoods. Had Mt. Pleasant previously adopted a transect-based code, the I'On developers could have built such a development as a matter of right.

Alas, though, it had not adopted such a code and, therefore, any developer in Mt. Pleasant that wanted to utilize traditional planning techniques was limited to the hope of obtaining the equivalent of a PUD. At the same time though, this legal hurdle did not exist for developers seeking to build a conventional, separated use subdivision or strip mall. Thus, for all intents and purposes, the same traditional town planning principles utilized to create Charleston, South Carolina were legally prohibited literally right next door to Charleston in Mt. Pleasant.

Because of instances like this, the need for enabling the use of traditional town planning techniques by right becomes very clear. Fortunately, this objective can be accomplished by adopting a locally customized SmartCode.

VII. How to Legally Implement a SmartCode in a Local Jurisdiction: A Five Step Process

While the SmartCode is certainly an innovative zoning and planning tool, adopters must remember that, in its default form, the SmartCode is only a template or model

¹⁷⁶ *I'On*, 526 S.E. 2d at 718.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 718 and 721.

ordinance.¹⁸² Because communities have unique local characteristics (whether it be unique architecture style, unique topography, unique laws, or unique political circumstances), the SmartCode as a general template must be legally calibrated to address and successfully intermingle with these local conditions: “Just as the physical elements of the Transect must be calibrated for local character in the SmartCode, legal elements must also be locally calibrated to comply with state and local laws.”¹⁸³ Failing to do so can result in a legally unenforceable SmartCode.¹⁸⁴

This section will outline one method to complete this legal calibration. However, one word of caution is necessary: while the SmartCode itself indicates which provisions should be locally-calibrated by highlighting those sections of the code¹⁸⁵, there is nothing to stop a municipal body from changing other language or design measurements (“metrics”) in the SmartCode as well. While doing so may be necessary in some instances, the SmartCode makes clear that if the metrics beyond the highlighted language are left as is, strong urbanism will result.¹⁸⁶

This advice is important because, in some cases (such as Fort Myers, Florida), municipalities have adopted the broader SmartCode template but altered the text and metrics so dramatically from the default provisions that the resulting SmartCode has, in the opinion of one planner involved in a Fort Myers SmartCode adoption, “lost its intelligence”¹⁸⁷ and now serves as a tool for planning disputes and dissatisfaction in that community.¹⁸⁸

While no planning tool will ever eliminate all disagreements, the SmartCode can reduce or help avoid legal disputes if it is properly calibrated to local laws and conditions. The following five-step process outlines one approach for doing so.

A. Step #1: Determine the Local Format for Implementing the SmartCode

The SmartCode template is designed in such a way that it can be adopted in several formats: “[t]he SmartCode may be adopted to replace existing conventional codes, or as an alternative overlay code, parallel to the existing codes for election

¹⁸² SmartCode & Manual, C14, at http://www.placemakers.com/smartcode/3000-01-Commentary_8.0.pdf (last visited Jan. 29, 2006).

¹⁸³ *Id.* at C15.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at A5. *See also id.* at SC4.

¹⁸⁶ *Id.* at A5.

¹⁸⁷ A copy of the Fort Myers SmartCode can be found at <http://www.cityftmyers.com/departments/dra/duanyplan.htm>.

¹⁸⁸ *See* Bill Spikowski, *Fort Myers' Smart Code Not Very Intelligent*, THE NEWS PRESS (Fort Myers, Florida), Feb. 7, 2005, available at <http://www.spikowski.com/FortMyersSmartCodeNotVeryIntelligent.pdf> (last visited Jan. 29, 2006). It should be noted though that some of the issues addressed by Mr. Spikowski, including the building height issue, have been disputed by the City of Fort Myers. *See* <http://www.cityftmyers.com/pdfs/TownHallBrochure.pdf>.

by an owner or developer.”¹⁸⁹ The benefit of this flexibility is that it allows the SmartCode to adapt to the varying political, legal, and design conditions found in different local jurisdictions. Thus, under one scenario, a jurisdiction may adopt the SmartCode as an exclusive and mandatory zoning code (replacing the existing Euclidean code), but only for a limited portion of its land. Alternatively, another jurisdiction may adopt the SmartCode as a strictly optional code, but permit that option to be exercised anywhere within the city limits.

Indeed, the only format that the drafters of the SmartCode strongly recommend against is one where portions of a conventional separated, single use-based code are melded with portions of the transect-based code into a hybrid code.¹⁹⁰ This hybrid approach is strongly discouraged because the underlying premises behind use-based coding and transect-based coding are, in many respects, incompatible in terms of key principles such as the mixing of uses. Thus, combining the two would likely create an incoherent result.

To assist in this step of a legal calibration, the following section examines various SmartCode formats and considers the benefits and contra-benefits of these approaches.

1. Exclusive and Mandatory Format

The SmartCode can be formatted to entirely replace all or portions of an existing conventional Euclidean zoning code.¹⁹¹ Under this approach, the SmartCode becomes the exclusive code for all or part of a local jurisdiction. This format was utilized by Petaluma, California when that municipality adopted a locally calibrated SmartCode as the exclusive and mandatory zoning code for a 400-acre area within Central Petaluma.¹⁹²

Almost immediately upon adoption, that portion of Petaluma began realizing economic growth and revitalization as a direct result of the SmartCode.¹⁹³ This occurred largely because compliance with the SmartCode was made mandatory within that area of Petaluma, an approach that fosters a cohesive and predictable result on the front end of the development decision-making process.

At the same time, the primary drawback of replacing an existing code with a mandatory SmartCode is that current regulatory climate makes this a difficult political, and potentially legal, option because existing land use rights within the SmartCode area will be entirely replaced rather than merely supplemented.¹⁹⁴ As a result, most of the SmartCodes that have been adopted under the exclusive and mandatory format have been

¹⁸⁹ SmartCode, *supra* note 186, at C14.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Laura Hall, *Revitalizing Neighborhoods & Town Centers, Success Stories: Petaluma Gets SmartCode*, at http://www.healthytransportation.net/view_resource.php?res_id=19&cat_type=revital.

¹⁹³ *Id.*

¹⁹⁴ SmartCode, *supra* note 186, at C14.

limited to certain defined areas within a jurisdiction such as a Central Business District or other downtown area.¹⁹⁵

Another potential downside of utilizing the exclusive and mandatory format is that, because it is replacing existing land use rights, political realities may require increased deviations from the default provisions of the SmartCode. This occurred in Sarasota, Florida where the SmartCode was adopted as an exclusive and mandatory code for parts of the downtown area.¹⁹⁶ However, to secure adoption of the SmartCode, significant departures from parts of the code were required.¹⁹⁷ Examples of these departures included the elimination of requirements for terminated vistas, pedestrian passages, and civic space designations.¹⁹⁸

Thus, while utilizing the exclusive and mandatory format can enhance predictability and overall cohesiveness in some instances, the cost of doing may involve having to limit the scope of the SmartCode within a jurisdiction or comprising certain important provisions of the SmartCode in order to get it adopted. Therefore, this option is best used in situations where local politics and local law are such that it can be accomplished with little departure from the terms and provisions of the SmartCode.

2. Parallel Code Format

Another possible format is to adopt the SmartCode as a parallel zoning code to an existing code.¹⁹⁹ Under this option, a local jurisdiction adopts the SmartCode but does not eliminate its existing conventional, Euclidean code. Rather, landowners and developers are afforded the option to use either code when developing within the jurisdiction—thus, increasing the development options for the landowner or developer.

To implement this option, a municipality must adopt a SmartCode and then develop a jurisdiction-wide transect regulating map (roughly, the SmartCode's counterpart to a Euclidean code's use district map).²⁰⁰ Pike Road, Alabama utilized a variation of this format when it adopted a locally calibrated SmartCode as a parallel option for its entire jurisdiction.²⁰¹ The primary distinction in the Pike Road case was that the municipality also utilized the exclusive and mandatory format for certain key growth areas—essentially requiring compliance with the SmartCode within these specifically mapped areas.²⁰²

¹⁹⁵ This is the case with Petaluma's SmartCode in that it is mandatory within the designated 400 acres but is currently not available to landowners or developers outside of those 400 acres.

¹⁹⁶ A copy of the Sarasota SmartCode can be found at http://www.sarasotagov.com/Planning/DowntownCode/CityCommisisonFinal_June2004%5CDowntownCode-FinalJune2004HP.html.

¹⁹⁷ See *Summary of Differences Between the Downtown Code and the DPZ SmartCode*, at <http://www.sarasotagov.com/Planning/DowntownCode/DowntownCodeHP.html>.

¹⁹⁸ *Id.*

¹⁹⁹ SmartCode, *supra* n. 186, at C14.

²⁰⁰ *Id.* at A9.

²⁰¹ See *Town of Pike Road SmartCode* Introduction, at www.riverregionsmartgrowth.com (last visited Jan. 29, 2006).

²⁰² *Id.*

A major benefit of the parallel code format is that it dramatically reduces potential political conflict because the SmartCode only serves to increase development options for landowners within that jurisdiction. On the other hand, an obvious downside of the parallel code format is that, since it does not require landowners to utilize the SmartCode, theoretically, it could go unused. However, as economic studies continue to demonstrate the economic advantages realized when developing under the SmartCode,²⁰³ it becomes increasingly less likely that the SmartCode will go unused.²⁰⁴

3. Floating Zone Format

A third possible format for adopting the SmartCode is the floating zone format. A “floating zone” is a zone that is “described in the text of a zoning ordinance, but it is unmapped.”²⁰⁵ In order to utilize a floating zone, a developer or landowner petitions the municipality for the zone to “float” to their property and, once approved for that property, the floating zone “drops down” and extinguish the underlying zoning.²⁰⁶

²⁰³ Various studies have concluded that projects permitted in accordance with New Urban and SmartCode principles will likely realize increased value: “our examination of selected communities that have employed the principles of “new urbanism” and form-based codes generally reveals that improvements to the built environment ultimately can be expected to enhance the economic value of downtown over the long-term. As detailed in our case studies, this is based primarily on a comparison of changes in assessed values of properties located in downtown districts with those located outside the downtown. *See Economics Research Associates Economic Analysis of Proposed Downtown Code: City of Sarasota*, 5, 6 at http://sarasotagov.com/Planning/DowntownCode/ERA_analysis%5CFinal_Draft_Report.pdf (last visited Jan. 29, 2006).

²⁰⁴ Indeed, large, more conventional –oriented development companies such as Montgomery, Alabama-based The Colonial Company have noted the benefits of the SmartCode and, in fact, have begun development projects permitted under the SmartCode:

The SmartCode and the City of Montgomery

The SmartCode may soon be in place as an optional zoning overlay in the city of Montgomery. After passing the Montgomery Planning Commission with a unanimous vote in October, the SmartCode will be voted on by the City Council in December. Once in place, developers can choose the SmartCode as an alternative to the current zoning method that has been in place since the 1960's...The SmartCode will bring the city up to date with a variety of municipalities throughout the country including many already in Alabama. This is a very important step for Montgomery from a planning a development standpoint, and perhaps more so from an aesthetic and conceptual point of view.

Excerpt from The Colonial Company’s Town of Hampstead website, at http://www.townofhampstead.com/Pages/newsletter_dec2005.html

²⁰⁵ *See* Municipal Association of South Carolina, *Guide to South Carolina Zoning and Planning Law* 15, at http://masc.state.sc.us/Resources/unsearchable_pubs/COMPPLAN.pdf (last visited Jan. 29, 2006).

²⁰⁶ *Id.*; “A property owner may petition for the zone to be applied to a particular parcel meeting the minimum zoning district area requirements as a floating zone.” *Id.* The concept of a floating zone is often used interchangeably with the term “overlay zone” though technically an overlay zone is different in that its application supplements, rather than displaces, the existing underlying zoning for a piece of property. *Id.* at 16.

Under this approach, the SmartCode itself becomes the floating zone and is available to the developer under most circumstances as an alternative zoning option by right. Both Flowood, Mississippi and Montgomery, Alabama have adopted the SmartCode in this format.²⁰⁷ Unlike the parallel code format though, the floating zone format does not require a jurisdiction-wide regulating plan. Rather, for Greenfield projects, the plan is prepared on a project-by project basis and with infill projects the plan is prepared incrementally by the municipal planning office.²⁰⁸ This is the primary difference between the parallel code and floating zone formats.

The end result is that the floating zone format can generally be adopted more quickly and less expensively than the other formats.²⁰⁹ Of course, as an optional floating zone, this format meets with the same theoretical problem faced by an optional parallel code format.

4. Selecting a SmartCode Format

Ultimately, the format that a jurisdiction selects must adhere to the local legal and political realities. Thus, if the municipal elected body appears willing to comprehensively revamp their existing zoning regulations, then the exclusive and mandatory format becomes much more politically feasible. However, if the elected officials are not prepared to so dramatically alter the existing land development system, the parallel code format or floating zone format can be used to incrementally introduce traditional planning techniques through a transect-based code like the SmartCode.

A jurisdiction considering the SmartCode should also realize that the exclusive and mandatory format will necessarily result in more SmartCode project applications since all permit applications will come in under the SmartCode. This means that the municipal planning office will need to be sufficiently staffed (and the staff sufficiently educated) to administer these applications which, although intuitive, nevertheless present a new review paradigm.

For a fully staffed planning office, this likely would not be a problem; however, a municipality with a small planning office—or one without a planning office—should exercise caution when considering its internal capabilities and resources to initially administer extensive applications under the SmartCode. In these cases, an optional floating zone format may initially be the most prudent approach since that option is likely to generate fewer initial project applications--obviously resulting in a more manageable agenda.

²⁰⁷ A copy of the Flowood SmartCode can be found at www.riverregionsmartgrowth.com and a copy of the Montgomery SmartCode may also be found at www.riverregionsmartgrowth.com. For additional details regarding Flowood's SmartCode, see Sylvain Metz, *Flowood's Big Plan*, JACKSON CLARION-LEDGER (Mississippi), Oct. 30, 2005, available at <http://www.clarionledger.com/apps/pbcs.dll/article?AID=/20051030/BIZ/510300364/1005>

²⁰⁸ See generally SmartCode, *supra* note 186, at 3.1.3, 4.1.3, & 4.1.4.

²⁰⁹ From start to finish, the Flowood SmartCode took approximately 3 months and less than \$5,000 while the Montgomery SmartCode took approximately 7 months and roughly the same amount.

Once a specific SmartCode format is selected, the jurisdiction—depending on the format—must then decide what sections of the SmartCode will be adopted. The next section discusses that step.

B. Step #2: Depending on the Selected Format, Determine What Parts of the SmartCode Will Be Adopted

Once a local jurisdiction has decided which SmartCode format it will adopt, the jurisdiction must then decide what portions of the SmartCode itself will be adopted. The SmartCode is divided into seven articles: Article 1 General to All Plans, Article 2 Sector Scale Plans, Article 3 New Community (or Greenfield Community) Scale Plans, Article 4 Infill Community Scale Plans, Article 5 Building Scale Plans, Article 6 Standards and Tables, and Article 7 Definitions of Terms.²¹⁰

1. Articles 1, 6, and 7

As a threshold matter, these three articles are mandatory for all SmartCode formats. For instance, by its very name, Article 1 is mandatory for all SmartCode adoptions, regardless of format selected. This article contains provisions related to the implementation, authority, purpose, and process of the SmartCode.²¹¹

Article 7 Definitions of Terms is also mandatory—though, when locally customized, certain definitions may be added, deleted, or altered in order to comport with local law. This is also true for Article 6 as, during the customization process, some of the measurements in the tables—and, in some cases, entire tables themselves, may be deleted or altered depending on the scope and the format of the SmartCode adopted.

For example, if a municipality selects the floating zone format, then the SmartCode is not applied on the sector (or regional) level. Thus, a Table 2 Sector/Community Allocation would not be applicable.²¹² Therefore, the local jurisdiction should include a Table 2 in the SmartCode, but leave that table blank with a designation of [Reserved]. This eliminates an inapplicable table but also allows for the jurisdiction to later seamlessly re-insert that table should it later adopt a parallel code or exclusive and mandatory format that includes a Sector Scale Plan.

2. Article 2

Article 2 covers Sector Scale Plans (sometimes also referred to as Regional Scale Plans) that in most instances will comprise jurisdiction wide regulating plans.²¹³ Therefore, this article is only utilized when a municipality develops a jurisdiction-wide regulating plan. And, since a jurisdiction-wide plan is normally created only under the exclusive and mandatory format or the parallel code format, Article 2 would not be included in a

²¹⁰ See SmartCode, *supra* note 186, at SC3.

²¹¹ *Id.* at SC4

²¹² *Id.* at SC82

²¹³ SmartCode, *supra* note 186, at SC12.

floating zone format.²¹⁴ Therefore, like Table 2, Article 2 should be included as a blank article designated [Reserved]. This approach avoids the potential legal problems associated with adopting code provisions that, upon adoption, do not possess an enforcement mechanism.

3. Article 3

Article 3 regulates Greenfield plans and generally will be included regardless of which format a jurisdiction adopts.²¹⁵ An exception to this general rule include may arise if the municipality adopts an exclusive and mandatory format or a floating zone format and provides that only infill property is eligible to use the SmartCode.

4. Article 4

Article 4 regulates infill plans and, like Article 3, will be included under most adopted SmartCodes, regardless of format.²¹⁶ An exception to this general rule include may arise if the municipality adopts an exclusive and mandatory format or a floating zone format and provides that only Greenfield property is eligible to use the SmartCode.

This might occur in the redevelopment of a specific parcel of infill land such as the Bull St. project in Columbia, South Carolina where a former state mental hospital property is being redeveloped under a proposal to use the SmartCode for that specific project.²¹⁷ Under that proposal, the city of Columbia would adopt the SmartCode essentially as a floating zone but one that, at least initially, can only be utilized for the Bull St. infill property.²¹⁸

5. Article 5

Article 5 regulates building scale plans and also will be included under most SmartCodes, regardless of format.²¹⁹ This article further codifies the regulatory standards for subjects such as landscaping, signage, building function, building disposition, and building configuration—depending on the context of the appropriate transect zone.²²⁰ Therefore, if a municipality intends to regulate on the block, street, or building level, this article must be adopted.

²¹⁴ This does not mean that a municipality could not develop a sector scale plan in conjunction with the floating zone format as a matter of law. However, the reality is that, in most cases, a municipality opts for the floating zone format because political realities are not conducive for adopting the SmartCode on a jurisdiction wide basis.

²¹⁵ SmartCode, *supra* note 186, at SC18.

²¹⁶ *Id.* at SC32.

²¹⁷ *Architect Outlines 178-Acre Bull Street Neighborhood Project for Downtown Columbia*, at <http://www.smartgrowthonline.org/news/bydate.asp?redate=5/1/05> (last visited Jan. 29, 2006).

²¹⁸ *Id.*

²¹⁹ SmartCode, *supra* note 186, at SC38.

²²⁰ *Id.*

Thus, to summarize, Articles 1, 6, and 7 will be adopted regardless of the SmartCode format selected by the local jurisdiction. Article 2 will generally be utilized only under the exclusive and exclusive format or the parallel code format when a jurisdiction wide regulating map is necessary under those formats. Articles 3 and 4 will generally be adopted regardless of the type of format. Finally, Article 5 should be adopted under all formats.

Of course, while not optimal, a municipality could decide to adopt the SmartCode and make only Greenfield property eligible to utilize it. In that case, Article 4 would be left blank and designated [Reserved]. Similarly, a municipality may decide to adopt the SmartCode and only make infill redevelopment eligible to utilize it. In that case, Article 3 would be left blank and designated [Reserved].²²¹

In any event, once the jurisdiction has decided what portions of the SmartCode it will adopt, it can then proceed to the next step of legally calibrating the SmartCode to federal, state, and local law. The following sections discuss some legal issues faced in doing that.

C. Step #3 Identify Federal and State Laws that May Affect a Locally Calibrated SmartCode

As a subdivision of the state, the laws of a municipality generally cannot supersede state law or federal law.²²² And, since zoning regulations are creatures of municipal law, they therefore cannot contradict state and federal law.²²³ As a result, the SmartCode—because it is adopted as a municipal law—also must be integrated, or calibrated, with existing federal and state law.

In general terms, the drafters of the SmartCode have already done this for the SmartCode template.²²⁴ However, there may be unique local conditions that require further legal calibration in terms of federal or state law. For instance, in order to be eligible to participate in the Federal Flood Insurance Program, landowners must comply with the building requirements set forth in flood zone maps developed by the Federal Emergency Management Agency (“FEMA”).²²⁵

In particular, Congress has authorized FEMA “to identify and publish information with respect to all flood plain areas, including coastal areas located in the United States, which have special flood hazards” and “to establish or update flood-risk zone data in all such areas, and make estimates with respect to the rates of probable flood caused loss for the various flood risk zones for each of these areas.”²²⁶ To accomplish this, FEMA uses computer and engineering models and statistical techniques to measure the flood risk within each community.²²⁷ The result is that, in order for a community to be enrolled in

²²¹ For further discussion of this issue, see SmartCode, *supra* note 186, at C12.

²²² U.S. CONST. art. VI.

²²³ *Id.*

²²⁴ See Slone, *supra* note 4.

²²⁵ 42 U.S.C. § 4001 (1994).

²²⁶ *National Wildlife Federation v. FEMA* 345 F. Supp. 2d 1151 (W.D. Wash. 2004).

²²⁷ *Id.*

the National Flood Insurance Program, municipalities must adopt regulations consistent with FEMA's minimum eligibility requirements.²²⁸

This very scenario has arisen in the recent efforts to rebuild the Mississippi gulf coast following Hurricane Katrina. In response to the hurricane, Mississippi Governor Haley Barbour established a commission dedicated to the rebuilding and recovery effort.²²⁹ Part of the commission's final work product included proposed municipality-specific redevelopment plans, primarily based on traditional town planning techniques, for much of the built environment destroyed by Hurricane Katrina.²³⁰

One of the recommendations resulting from this effort was for the affected municipalities to revamp their zoning codes to incorporate transect-based components either as a replacement or supplement to their existing codes.²³¹ Doing so would allow the municipalities to utilize techniques like mixed uses and context-based frontages and building heights. However, because large portions of the land sought to be rebuilt was located within areas covered by FEMA flood zone maps, the recommended use of the SmartCode in those areas had to be calibrated to the restrictions set forth by FEMA for these flood zones.²³²

Thus, where the SmartCode template prescribes certain public and private frontages, as well as certain building heights, those general requirements had to be calibrated to the local condition by allowing for variations from these standards in order to remain compliant with the FEMA zoning requirements.²³³

Another example of calibrating the SmartCode to federal law based upon specific local conditions involves air traffic and the noise it creates. The SmartCode includes sound regulations that prescribe how much noise a business can generate depending on the specific transect zone.²³⁴ Essentially, the SmartCode permits higher sound levels in the more urban T5 and T6 transect zones while requiring lower sound levels in the more rural transect zones.²³⁵

However, these standards in the SmartCode template may in some instances require adjustment because of local conditions regulated by federal law. One such condition is

²²⁸ *Id.*

²²⁹ Andres Duany, *Mississippi Renewal Forum Summary Report: A Gulf Coast Renaissance* 3, at www.mississippirenewal.com.

²³⁰ *Mississippi Renewal Forum Summary Report*, 15-61, at www.mississippirenewal.com (last visited Jan. 29, 2006). The 11 Mississippi municipalities involved in the effort were: Bay St. Louis, Biloxi, D'Iberville, Gautier, Gulfport, Long Beach, Ocean Springs, Pascagoula, Pass Christian, Moss Point, and Waveland. *Id.* at 15.

²³¹ *Mississippi Renewal Forum Codes Report*, 5, at www.mississippirenewal.com (last visited Jan. 29, 2006).

²³² See *SmartCode: Model Development Code for Mississippi Cities and Counties*, Section 5.3.2f, at www.mississippirenewal.com ("All specified Building Heights may be increased by the base elevations required by the applicable FEMA standards.")

²³³ *Id.*

²³⁴ SmartCode, *supra* note 186, at 5.3.9a.

²³⁵ *Id.*

the presence of an airport. In *City of Burbank v. Lockheed Air Terminal, Inc.*²³⁶, a case involving a city ordinance that prohibited jets from taking off or landing between the hours of 11:00 p.m and 7:00 a.m., the Supreme Court held that the ordinance was unconstitutional because the Federal Aviation Act²³⁷ and the Noise Control Act²³⁸ preempt local regulations governing aircraft noise.²³⁹ This issue will likely require legal calibration in jurisdictions that include airports by exempting those airports from the sound levels requirements set forth in the SmartCode.

Importantly, these issues represent just two potential examples of how the SmartCode template requires careful legal calibration to federal law depending on local conditions.²⁴⁰ In fact, the need to legally calibrate the SmartCode to local conditions is not limited to federal law but also is an issue with state laws. This can occur on two levels: 1) whether state law permits a local jurisdiction to adopt a transect-based zoning code and 2) if state law permits the adoption of a transect-based zoning code, whether state laws nevertheless preempt certain portions of the code.

The first issue arises when considering the scope of a state's zoning enabling act. While all states have at some point adopted zoning enabling acts,²⁴¹ these acts are generally patterned after the SZE and the separated, single use regulation it promotes. Thus, because the SZE does not specifically enable transect-based codes, some states have opted to adopt additional legislation that does so.²⁴² Generally, this issue arises in relation to the question of home-rule versus "Dillon's Rule" jurisdictions and whether the zoning enabling act in a Dillon's Rule jurisdiction can reasonably be construed to specifically enable these types of codes without additional statutory provisions.²⁴³ Therefore, if a local jurisdiction is located in a Dillon's Rule state, prior to adopting a

²³⁶ *City of Burbank v. Lockheed Air Terminal, Inc.* 411 U.S. 624 (1973).

²³⁷ Federal Aviation Act, 49 U.S.C. §§ 1371-1386 (1958) (codified as amended at 49 U.S.C. §§ 1371-1387 (1963)).

²³⁸ Noise Control Act, 86 Stat. 1234 (1972) (codified as amended at 42 U.S.C. §§ 4901-4918 (1982)).

²³⁹ *Burbank*, 411 U.S. at 626.

²⁴⁰ Another example of the need to calibrate the SmartCode to federal law involves cellular phone towers. Telecommunications Act of 1996 partially preempts zoning of cellular towers by providing that local zoning may not reasonably discriminate among providers of functionally equivalent providers and that zoning cannot have the effect of totally prohibiting such services. *See* 47 U.S.C. 332 (1996). Moreover, at least one federal regulation presents an even more explicit barrier to zoning efforts in that it provides that any state or local zoning or land use regulation which "materially limits transmission or reception by satellite earth station antennas, or imposes more than minimal costs on users of such antennas, is preempted" unless the regulations are reasonable. *See* 47 C.F.R. § 25.105 (1991). This issue may require local calibration because the SmartCode provides for structural height limits that are likely to be lower than the height of most cellular towers.

²⁴¹ WILLIAMS, *supra* n. 87, at 461.

²⁴² Examples of state statutes that seek to enable these type traditional planning techniques include: Pa. Stat. Ann. Tit 53 § 10-702A; Conn. Gen. Stat. § 8-2j(b); Excerpt from Wisconsin's 1999 Act 9, codified at Wisconsin Statutes Section 66.1027; Virginia Zoning enabling Statute Sections 15.2-2200 and 15.2-2283

²⁴³ This is not to say that additional enabling legislation is necessarily required but, rather, that it may serve as additional legal support for the validity of form-based and transect-based codes. Indeed, municipalities such as Montgomery, Alabama and Pike Road, Alabama have concluded that they may adopt versions of the SmartCode without additional state enabling legislation, though they are in a Dillon's Rule state.

SmartCode, that jurisdiction should carefully research whether doing so is permissible under the existing state zoning enabling act.

The second (and more widespread) issue is whether existing state laws may preempt certain portions of the SmartCode. For example, the SmartCode requires new Greenfield projects to reserve land within the project for an elementary school at a default calculation of 1 acre reserved land per 100 dwelling units.²⁴⁴ This requirement serves to encourage the development of walkable, neighborhood schools. However, some states require minimum school acreage sites in excess of the SmartCode's default calculation.²⁴⁵ In other instances, local school boards are exempt from zoning regulations altogether.²⁴⁶ In these situations, the SmartCode template must be legally calibrated to comply with the state laws by either adjusting the default acreage calculations to comport with state law requirements or, if required by state law, exempting land owned by the school district from the SmartCode.

Another example of the need to legally calibrate the SmartCode to state law involves the widths of thoroughfares. The SmartCode creates an inventory of thoroughfare assemblies, including widths, that are permitted depending on the appropriate transect zone.²⁴⁷ However, in some states, the state transportation department regulates all or part of thoroughfare assemblies.²⁴⁸ In these instances, the SmartCode's thoroughfare assembly metrics generally must comport with the permitted state standards or face the possibility of being legally preempted by the state standards. Therefore, when adopting a SmartCode, the local jurisdiction should take care to avoid adopting thoroughfare assemblies that are not permitted under state law.

Ultimately, state laws governing minimum school acreage and thoroughfare assemblies are just two examples of how a local jurisdiction must legally conform a SmartCode to state law in order to make the SmartCode fully enforceable. Once the SmartCode has been carefully calibrated to federal and state laws, the jurisdiction should then proceed to the next step of legally calibrating the SmartCode to local laws that may concurrently govern matters also governed by the SmartCode.

D. Step #4 Identify Local Laws Outside the Existing Zoning Regulations that May Be Preempted by the SmartCode

1. Unifying Zoning Regulations and Subdivision Regulations under the SmartCode

The SmartCode is a “unified” zoning and planning ordinance meaning that, in certain cases, it regulates matters that are not commonly regulated by a Euclidean zoning

²⁴⁴ SmartCode, *supra* note 186, at 3.7.3b.

²⁴⁵ COUNCIL OF EDUCATIONAL FACILITY PLANNERS INTERNATIONAL & THE U.S. ENVIRONMENTAL PROTECTION AGENCY, *Schools for Successful Communities: An Element of Smart Growth* 17, 18 (September 2004).

²⁴⁶ *Id.* at 20.

²⁴⁷ See SmartCode, *supra* note 186, at Tables 3A, 3B, & 3C.

²⁴⁸ See SUBURBAN NATION, *supra* note 3.

ordinance.²⁴⁹ For example, many jurisdictions have adopted both a zoning ordinance and subdivision regulations.²⁵⁰ Under this approach, the zoning ordinance commonly regulates land usage standards while subdivision regulations focus more on dimensional standards such as street widths and sidewalk placements.²⁵¹ The result is that, though both usage and dimensional standards necessarily interact in the development of the built environment, today's land development system artificially separates them into different ordinances.

The SmartCode reverses this incongruous result and consolidates the overall regulation of land development into a single ordinance. While this approach better emulates the actual development of the built environment, when adopting a SmartCode, local jurisdictions must be sure of two important facts:

- 1) That their state enabling act permits the integration of zoning and subdivision regulations into a single ordinance; and,
- 2) That, when legally calibrating the SmartCode, both the resolution adopting the SmartCode and the SmartCode itself clearly and unambiguously mandates this consolidated result.

This means that, depending on the format of SmartCode adopted, the adopting ordinance and SmartCode text must clearly provide that this new consolidated regulation supersedes both the existing zoning regulations *and* subdivision regulations for the land that will be subject to regulation by the SmartCode.

2. The Incorporation of Other Regulations into the SmartCode

Another important area of local regulation that may need to be synced with the SmartCode are other local ordinances that fall outside of the existing zoning regulations or subdivision regulations but still address issues regulated by the SmartCode. Four common examples are: 1) local sign ordinances, 2) noise ordinances, 3) tree ordinances, and 4) landscaping ordinances. While some local jurisdictions incorporate sign, noise, tree, or landscaping regulations into their actual zoning ordinances,²⁵² others regulate these areas by other ordinances outside the actual zoning regulations.²⁵³

²⁴⁹ SmartCode, *supra* note 186, at SC4.

²⁵⁰ MONTGOMERY, ALA., ZONING CODE (1985).

²⁵¹ *Id.*

²⁵² The following are examples of local jurisdictions that include some or all of these areas within their zoning ordinance:

Signs

Bloomington, Ga. Appendix A Zoning. Article IX Sign Regulations.

Canton, Ga. Appendix A zoning Ordinances. Article E General Sign Regulations.

Gadsden, Ala. Chapter 130 Zoning. Article XI Off-Premises Signs.

Huntsville, Ala. Appendix A Zoning. Article 72 Sign Control Regulations

Lake Charles, La. Appendix A Zoning. Part 2 Regulations of General Applicability. Section 5-211 Signs.

Burleson, Tex. Appendix B zoning. Article 4 Supplemental Regulations. Section 39 Sign Regulations.

Noise

In these situations, since the SmartCode regulates signage, trees, noise, and landscaping,²⁵⁴ local jurisdictions, when legally calibrating the SmartCode, must incorporate language

Mountain Park, Ga. Chapter 117 Zoning. Section 117-23 Abatement of Noise, Smoke, Gas, Vibration, etc.
Flower Mound, Tex.. Chapter 98 Zoning. Division 4 Performance Standards. Section 98-1052 Noise.
Wichita Falls, Tex. Appendix B Zoning. Section 6431 Noise Zones.

Trees

Snellville, Ga. Appendix B Zoning. Article XXI Tree Preservation Ordinance
Lake Dallas, Tex. Chapter 122 Zoning. Article XXV Screening, Landscaping, and Tree Preservation.
Wichita Falls, Tex. Appendix B Zoning. Section 6820 Preservation of Existing Trees.
Tequesta, Fla. Chapter 78 Zoning. Division 4 Landscaping. Section 78-403 Preservation of Existing Trees

Landscaping

Snellville, Ga. Appendix B Zoning. Article XX Landscape Ordinance.
Duncanville, Tex. Appendix A Zoning Ordinance. Article XIV-E Section 9 Landscaping Requirements.

²⁵³ The following are examples of local jurisdictions that regulate some or all of these areas outside of their zoning ordinance:

Noise

Gadsden, Ala. Chapter 46 Environment. Article IV Noise.
Orange Beach, Ala. Chapter 30 Environment. Article III. Noise.
Tifton, Ga. Chapter 38 Environment.
Suwanee, Ga. Chapter 34 Environment.
Anna Maria, Fla. Chapter 26 Environment. Article IV Noise.

Trees

Dothan, Ala. Chapter 99 Tree Preservation.
Tifton, Ga. Chapter 86 Vegetation.
Dunnellon, Fla. Chapter 74 Vegetation. Article III Trees.
Sebring, Fla. Chapter 24 Vegetation.

Landscaping

Huntsville, Ala. Chapter 27 Vegetation.
Dothan, Ala. Chapter 99 Tree Preservation and Landscaping.
Dunnellon, Fla. Chapter 74 Vegetation. Article IV Water Efficient Landscaping.
Madeira Beach, Fla. Chapter 106 Vegetation. Article II Landscaping.

Signs

Mountainbrook, Ala. Chapter 17 Signs and Advertising Structures.
Irondale, Ala. Chapter 14 Signs.
Green Cove Springs, Fla. Chapter 110 Signs.
Sewall's Point, Fla. Chapter 74 Signs.
Charleston, S.C. Chapter 18 Signs.

²⁵⁴ It should be noted that sign, noise, tree, and landscaping are only examples of regulatory areas that affect zoning and planning but occasionally fall outside of existing zoning and subdivision ordinances. While these four areas are certainly the most common, other subjects covered by the SmartCode may also be regulated by separate ordinances. Therefore, local counsel for the municipality should carefully review the local jurisdictions existing ordinances to determine if any other areas covered by the SmartCode are also regulated by a separate municipal ordinance. If that is the case, then any other such ordinance must also be clearly and unambiguously superseded by the SmartCode for land subject to regulation by the SmartCode.

into the SmartCode that clearly and unambiguously provides that the SmartCode preempts these other ordinances for projects permitted under the SmartCode.²⁵⁵

Once the local jurisdiction identifies all of the regulatory areas governed by the SmartCode that are regulated by the local jurisdiction, but outside of the actual zoning regulations, counsel should proceed to the final step of legally calibrating the SmartCode, that is, actually adjusting the language of the SmartCode so that it complies with local and state law.

E. Step #5 Legally Calibrate the SmartCode Template to Local and State Law

Since the SmartCode is a model ordinance, the provisions must be customized for local jurisdictions prior to adoption. The SmartCode template itself identifies some of these areas by highlighting certain provisions requiring local calibration.²⁵⁶ Therefore, the first step in completing a legal calibration is to carefully review the highlighted language in order to confirm that it—or, alternatively, language replacing it, comports with state and local law.

Once this has been completed, two other legal calibration steps remain: a) calibration of legal enforceability; and b) calibration for legal terminology.

1. Calibration for Legal Enforceability

The first step involves compiling all of the federal and state laws from Step #3 that apply to the local jurisdiction at issue and adjusting the terms of the SmartCode so as to make it compliant with these laws. For instance, the school acreage standards set forth in Section 3.7.3b may need to be altered to bring it into compliance with state-mandated minimum acreage standards. Or, the provision in Section 1.6.1d that creates a transfer of development rights program may need to be deleted if such a program is not permitted under state law.

Similarly, for federal law, building height and frontage standards may need to be altered to bring them into compliance with federal flood insurance requirements. Or, the sound standards from provisions such as Section 5.3.9a may need to be altered if there is a nearby airport whose emitted sound cannot be regulated by local jurisdictions.

Ultimately, this step involves taking the federal and state laws identified in Step #3 and actually adjusting the terms of the SmartCode to bring them into compliance with the federal and state laws that would otherwise preempt the SmartCode provisions.²⁵⁷

²⁵⁵ SmartCode, *supra* note 186, at 5.3.7, 5.3.8, 5.3.9, and Table 6.

²⁵⁶ While most versions of the SmartCode accomplish this highlighting by setting the language apart in blue font, other versions have set the language apart by highlighting it instead. Whatever the form, the language in the SmartCode that must be carefully calibrated to local conditions is that language set apart from the conventional black, non-italicized font.

²⁵⁷ Again, this article does not seek to create a comprehensive inventory of the various federal, state, and local laws to which the SmartCode must be calibrated. Rather, because local conditions are so varied

2. Calibration of Legal Terminology

Finally, once the SmartCode has been calibrated to bring it into a consistent and enforceable relationship with federal, state, and other local laws, the municipality should attempt to calibrate the definitions utilized by the SmartCode in Article 7 with existing definitions of the same terms utilized in other local land development regulations. Under this step, if existing land use regulations define a term such as “Street” one way and the SmartCode defines it another, the definition of that term should be standardized to avoid claims of ambiguity or inconsistency.

If the terms cannot be standardized because their legal definitions are inherently incompatible, then either the existing regulation or the SmartCode should be amended to use a different term for the defined concept. This will further serve to avoid the confusion encountered when the same term is differently defined within various components of the overall municipal land development regulatory system.

VIII. Conclusion

As both a transect-based and form-based unified development ordinance, the SmartCode is an ideal tool for municipalities to adopt in order to legalize the use of traditional planning techniques in the development and redevelopment of real property. Legalizing these techniques would enable municipalities to permit the development of mixed-use, compact, walkable projects, based on a coordinated street network, as a matter of right.

In order to implement the SmartCode, local jurisdictions must calibrate the SmartCode to local design, political, and legal conditions. If the SmartCode is not legally calibrated to state and local law, it risks being preempted or deemed inconsistent and, therefore, possibly unenforceable. This article outline a five-step process guiding legal counsel through the key issues that must be considered and resolved prior to adopting the SmartCode for a local jurisdiction.

In the end, without a re-commitment to the traditional planning techniques used to create much of our country’s early built environment, we risk a grave situation where our zoning and planning regulations will continue to provoke an unsustainable development pattern that will, eventually, reach a point of crisis.

While we are not there yet, this crisis of unsustainability looms perilously close. Indeed, close enough that a comprehensive redesign of our zoning and planning regulations must become a nationwide priority.

throughout this country, this article seeks only to identify representative examples of the types of laws that may arise because of these local conditions. For additional examples of SmartCode provisions potentially requiring calibration, *see* Slone, *supra* note 4. (“ Some examples of areas that sometimes require adjustment are the provisions dealing with transferable development rights, fast-tracking approvals, building code waivers and appeals processes.”) *Id.*

The SmartCode, and its legal calibration for local jurisdictions, is a key step in that direction.