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Form-Based Codes: Measured Success through Both Mandatory and Optional Implementation Note

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Note

FORM-BASED CODES: MEASURED SUCCESS THROUGH BOTH MANDATORY AND OPTIONAL IMPLEMENTATION

JOHN M. BARRY

The conventional zoning practices that became widely accepted in the later part of the twentieth century have drastically changed the way American cities and towns have been physically planned and developed. Conventional zoning has encouraged suburban sprawl through its promotion of low density and single use development. The consequences of this type of zoning are not limited to the physical design of the neighborhoods in which we live and work. Sprawl has also changed the way in which Americans conduct their daily lives as we increasingly rely on the automobile to commute to school and work or run errands. Not only is this mode of transportation extremely costly in the midst of the current energy crisis, but isolated automobile travel further limits public interaction, which would otherwise occur if cities and towns developed in a more traditional form.

Form-based codes present a promising zoning alternative to sprawl-inducing conventional ordinances. Unlike conventional zoning, form-based codes place a primary emphasis in the design—rather than the use—of buildings and encourage higher density, mixed use development. The physical result is a more pedestrian-friendly community, mimicking the way cities and towns have traditionally developed.

Recently, cities across the United States have grown weary of conventional zoning ordinances and have begun to adopt form-based codes. Some municipalities have entirely abandoned their conventional zoning ordinances and have adopted mandatory form-based codes, while other cities have implemented an optional format in which the individual developer is given the right to choose to build according to the conventional ordinance or the form-based code. Although mandatory and optional form-based codes differ in how they are applied, both formats have proven successful where adopted.
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FORM-BASED CODES: MEASURED SUCCESS THROUGH BOTH MANDATORY AND OPTIONAL IMPLEMENTATION

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I. INTRODUCTION

Historic American places, such as Boston’s Beacon Hill, Charleston, Nantucket, and San Francisco, exude character and charm, yet are nearly impossible to recreate under conventional zoning ordinances. The reason for this dilemma is that conventional zoning segregates land use, typically allowing only for a single use in a certain area. It is simply illegal under many zoning codes to create a neighborhood with a classic American main street where pedestrians can walk to the grocery store or where the storeowner lives above his business. The result has been “profoundly damaging” to the American landscape as single use zoning has decreased population densities, thereby increasing suburban sprawl and reliance on the automobile.

New Urbanism, a growing land use movement led by a collection of architects, attorneys, and planners, presents a response to the sprawling development that has come to dominate much of the suburban and urban American environment that is regulated by conventional zoning ordinances. New Urbanism stresses the importance of the traditional neighborhood: narrow streets, short blocks, and commingled commercial and residential land uses—central features of older cities which have largely disappeared in face of today’s zoning practices. The traditional neighborhood can be recreated by developing new ordinances that allow

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3 Chad D. Emerson, Making Main Street Legal Again: The SmartCode Solution to Sprawl, 71 MO. L. REV. 637, 637 (2006).
4 Duany & Talen, supra note 2, at 1445. Sprawl is an unhealthy form of growth as it “tends not to pay for itself financially and consumes land at an alarming rate, while producing insurmountable traffic problems and exacerbating social inequality and isolation.” DUANY ET AL., supra note 1, at 4.
5 See CONGRESS FOR THE NEW URBANISM, CHARTER OF THE NEW URBANISM (1996), available at http://www.cnu.org/charter (“We stand for the restoration of existing urban centers and towns within coherent metropolitan regions, the reconfiguration of sprawling suburbs into communities of real neighborhoods.”).
for a mix of uses and encourage the design of pedestrian-friendly, walkable communities. The form-based code is a recently developed regulatory tool that enables the implementation of traditional neighborhood features.

A form-based code is “[a] method of regulating development to achieve a specific urban form,” a tool that favors regulating a property’s form over its use. The objective of form-based codes is to create a more desirable place that will endure for years to come. To accomplish this goal, form-based codes set certain standards for the appropriate form and scale of building facades, streets, and blocks within a given community. Whereas conventional zoning limits development of land to a single use, form-based codes do not strictly limit the use of property, and therefore allow for mixed uses within the same block or building. By permitting mixed land use and regulating the form of development, form-based codes create places with unique character—a trait present in America’s historic places, yet woefully lacking in many areas encompassed by sprawl.

As the newest and most promising of the New Urbanist regulatory tools, form-based codes allow new communities to be developed in a traditional manner, rather than the sprawling developments that are promoted by conventional zoning. Unlike early New Urbanist developments—such as Seaside in Florida and Kentlands in Maryland, which were privately covenanted projects—form-based codes achieve a similar traditional neighborhood design through public regulation. These new codes enable municipalities to regulate the form of future development within its jurisdiction, unifying all construction projects under a singular ordinance. Form-based codes can generally be

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6 New Urbanists assert that “neighborhoods should be diverse in use and population; communities should be designed for the pedestrian and transit as well as the car; cities and towns should be shaped by physically defined and universally accessible public spaces and community institutions.” Id.


9 See Peter Katz, Form First, PLAN., Nov. 2004, at 16, available at http://www.formbasedcodes.org/downloads/FormFirst.pdf (explaining that form-based codes build “on the idea that physical form is a community's most intrinsic and enduring characteristic”).

10 Form-Based Codes Inst., supra note 8.


12 Sitkowski & Ohm, supra note 7, at 163. “[U]ntil recently,” form-based development has “been mainly applied in private-covenanted regimes, . . . a legal atmosphere quite different from the public regulatory sphere.” Id.
implemented in a municipality in one of two ways: either through a mandatory code, which replaces the existing conventional zoning code, or an optional code that lays parallel to the existing code, leaving the landowner with the discretion over which regulatory code is applied.13

Currently, there is much debate over whether form-based codes should be adopted in a mandatory or optional format.14 Proponents of form-based codes assert that a mandatory format will achieve the best results for municipalities, since doing so guarantees up-front that all development would adhere to a cohesive and predictable form.15 But, as is so often true, an idea that works in theory may occasionally fail to successfully translate into reality. The legal and political difficulties associated with entirely replacing the existing ordinances can hinder the adoption of a mandatory form-based code.16 In areas where landowners generally favor low density sprawl, there will be considerable friction when a mandatory form-based code is proposed to replace an existing zoning ordinance.17 Although optional form-based codes do not guarantee compliance, reality has demonstrated that the optional format can be implemented with success,18 while simultaneously circumventing the problems associated with the mandatory format.

This Note will look at what has already occurred, focusing on areas and cities that have incorporated form-based codes into their local zoning ordinances. Part II of this Note will examine the attributes of form-based codes and why they are superior zoning devices when compared to conventional zoning.19 Part III highlights the benefits of mandatory form-based codes by analyzing municipalities where the conditions have been present to successfully adopt and implement this format.20 In Part IV, the disadvantages of the mandatory format and the advantages of optional form-based codes will be discussed through studying specific municipalities that have adopted the optional arrangement.21 This Note will demonstrate that while mandatory form-based codes ensure traditional neighborhood development, they are not practicable in all municipalities. However, the benefits of form-based codes may still be realized through initially using an optional format, which has proven successful in curtailing

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13 Emerson, supra note 3, at 670.
15 Emerson, supra note 3, at 671.
16 See id. (using the SmartCode, a model form-based code, as an example).
17 See Langdon, supra note 14, at 29 (stating that making a form-based code mandatory for an entire municipality “may trigger strong opposition from people who prefer [lower density] development”).
18 See discussion infra Part IV.C (concluding that landowners usually elect to use form-based codes over conventional zoning ordinances in jurisdictions that allow the choice).
19 See infra Part II.
20 See infra Part III.
21 See infra Part IV.
sprawl across the United States. In a concluding recommendation, this Note proposes that where optional form-based codes are used, a mandatory code should be adopted in commercial or downtown centers of a municipality, areas that have recently proven more receptive to adoption of a mandatory format.

II. FORM-BASED CODES SHOULD BE FAVORED OVER CONVENTIONAL ZONING

A. Community Design: Form-Based Codes Compared to Conventional Zoning

Form-based codes possess many advantages over conventional zoning ordinances. Conventional zoning generally limits density per acre and segregates different land uses by clustering residential parcels together, ensuring that they are entirely separated from commercial areas. In some residentially zoned areas, acreage requirements guarantee a minimum lot size which further separates one dwelling from another, thus increasing the distance between residential and commercial areas. Even in municipalities without minimum acreage requirements, the continuous tracts of residentially zoned land are generally large. Where commercial, residential, and office areas meet, they are frequently divided by large, congested roadways.22

The result of conventional single use zoning has been sprawling development. Acting as a blueprint for suburban sprawl, conventional zoning limits positive public interaction, harms the environment by encouraging driving, and is aesthetically unappealing.23 Sprawl not only harms the environment by increasing automobile traffic, but the low-density development that results occupies enormous tracts of land. This development “wreaks massive destruction on our wildlands and wildlife” as well, with an estimated “one-fifth of the land area in the United States . . . affected by road building.” SIERRA CLUB, SMART CHOICES OR SPRAWLING GROWTH 5 (2000), available at http://www.sierraclub.org/sprawl/50statesurvey/SmartChoices.pdf. The far distances between a community’s commercial center and its residential neighborhoods can only be covered by driving, which limits the daily interaction that would otherwise occur during the short walk to a town center25 and increases the amount of pollution created by automobiles.26

22 See Sperber, supra note 11, at 77 (stating that conventional zoning creates “pedestrian unfriendly roadways”).

23 Sprawl not only harms the environment by increasing automobile traffic, but the low-density development that results occupies enormous tracts of land. This development “wreaks massive destruction on our wildlands and wildlife” as well, with an estimated “one-fifth of the land area in the United States . . . affected by road building.” SIERRA CLUB, SMART CHOICES OR SPRAWLING GROWTH 5 (2000), available at http://www.sierraclub.org/sprawl/50statesurvey/SmartChoices.pdf.

24 See Duany & Talen, supra note 2, at 1447 (noting that if urban areas were designed around the mobility of the pedestrian “the neighborhood unit would be generally organized within a quarter mile radius and would contain a mix of housing types,” parks, schools, and stores).

25 See DUANY ET AL., supra note 1, at 25 (noting that conventional zoning discourages residents from walking to commercial areas).
The problem of auto-dependency is particularly acute in the United States because, unlike the residents of the more densely populated cities and towns of Europe, suburban sprawl compels Americans into driving further distances on a regular basis. Currently, Americans are being confronted with the harsh reality of their auto-dependent lifestyles as gas prices have skyrocketed to record levels.

Unlike traditionally designed towns and cities, sprawl also suffers from aesthetic deficiency. The result of sprawl is the creation of a relatively characterless place, at least in comparison to traditional neighborhoods. Not only does conventional zoning typically isolate different land uses from one another, but it does relatively little to regulate the physical appearance of buildings that comprise the sprawling development it promotes. Admittedly, the physical result of form-based codes will not be favored by everybody. However, this concession should not deter municipalities from at least offering form-based codes as an alternative to conventional zoning.

B. The Key Attributes of Form-Based Codes

By the mid-twentieth century, conventional zoning—and thus pervasive sprawl—became prevalent in many American municipalities. However, more recently, conventional zoning has been recognized as “simply inadequate to meet the demands of twenty-first century challenges in achieving sustainable communities.”

Form-based codes present a sensible solution to the sustainability concerns raised by conventional zoning, as they tend to promote environmentally-friendly development,
civic interaction, and individual physical health.\textsuperscript{32} It is worth examining the basic elements shared by form-based codes, all of which help achieve a better public space as well as a higher degree of sustainability.\textsuperscript{33}

Although form-based codes are individually customized for specific municipalities,\textsuperscript{34} they usually share the following general components:

Regulating Plan. A plan or map of the regulated area designating the locations where different building form standards apply, based on clear community intentions regarding the physical character of the area being coded.

Building Form Standards. Regulations controlling the configuration, features, and functions of buildings that define and shape the public realm.

Public Space/ Standards. Specifications for the elements within the public realm (e.g., sidewalks, travel lanes, on-street parking, street trees, street furniture, etc.).

Architectural Standards. Regulations controlling external architectural materials and quality.\textsuperscript{35}

Additionally, form-based codes commonly include an administration section to “clearly define [the] application and project review process,” and a definitions section “to ensure the precise use of technical terms.”\textsuperscript{36} Each municipality determines, through public participation, the specifications of each component to be included in their local form-based code.\textsuperscript{37} In this way, the local community plays a much larger role in the creation of a form-based code when compared to the creation of conventional zoning

\textsuperscript{32} Suburban sprawl is thought to increase obesity levels among residents who live in such areas because of the lack of daily walking and bicycling. See Froma Harrop, \textit{So Will They Vote with Their Feet?}, PROVIDENCE J. BULL., Mar. 28, 2004, at E9, available at LEXIS, News Library, PRVJNL File (citing an American Journal of Health Promotion study that pins much of the obesity problem on sprawl).

\textsuperscript{33} Traditional neighborhood design, by its nature, equates to ecologically sustainable development. See David Owen, \textit{Green Manhattan: Everywhere Should Be More Like New York}, NEW YORKER, Oct. 18, 2004, at 111 (concluding that traditionally developed areas, such as Manhattan, have a smaller ecological footprint than areas with lower population densities, which increases damage to the environment).

\textsuperscript{34} Sitkowski & Ohm, \textit{supra} note 7, at 164.

\textsuperscript{35} Form-Based Codes Inst., \textit{supra} note 8. Architectural standards are the most optional of these components. \textit{Id.} (suggesting that architectural standards are “sometimes,” but not always, included).

\textsuperscript{36} \textit{Id.}

\textsuperscript{37} To maximize community input, the developer or project consultant “will organize and lead design workshops or a full planning charrette to engage the community, gather ideas and goals, and formulate implementation strategies.” FORM-BASED CODE INST., \textit{SAMPLE REQUEST FOR QUALIFICATIONS (RFQ) FOR CONSULTANTS TO PREPARE A FORM-BASED CODE 2} (2007), available at http://www.formbasedcodes.org/downloads/FBCI_SampleRFQ_010607.doc. The creation of form-based codes is “based on specific urban design outcomes desired by the community, that may be identified through an inclusive, designed-focused public participation process.” Sitkowski & Ohm, \textit{supra} note 7, at 164 (quoting planner Paul Crawford).
ordinances.

The form-based regulation of buildings, streets, and other public spaces as defined in relation to each other, results in a more intensely populated human environment. Common features of form-based codes require that buildings have minimal setbacks from sidewalks, houses have porches in the front, and garages or parking lots are located in the back.\(^{38}\) Individual buildings “maintain a degree of architectural consistency,”\(^{39}\) yet are not overly uniform in design as to lack individual character relative to other proximately situated buildings. On the other hand, conventional zoning only regulates individual building design through strictly numerical parameters, such as dwellings per acre, floor area ratio, height limitations, and parking requirements.\(^{40}\) Different structures are designed not under an agreed-upon community form, but rather are largely left to the whim of the individual developer. Conversely, form-based codes regulate buildings and facades in relation to each other through illustrated diagrams which address community development as a whole.\(^{41}\) Other oft-found features of form-based codes are narrow streets, shorter blocks, and the elimination of on-site parking requirements.\(^{42}\) The result is better municipality wide planning.

These general attributes of form-based codes naturally encourage more public interaction by creating a more active civic space. As commercial and retail centers are located closer to residences, more people will be able to walk to shops. Shortening the distance between residences and stores is further encouraged by limiting or removing on-site parking requirements, which allows for shorter pedestrian walking distances by eliminating the sea of parking lots that typically front commercial buildings regulated under conventional zoning ordinances.\(^{43}\) Building facades are required to be located close to sidewalks and streets, ensuring the creation of a more

\(^{38}\) See DUANY ET AL., supra note 1, at 17, 205 (highlighting common New Urbanist design features). The physical elements of form-based codes are rooted in New Urbanist principles. Sitkowski & Ohm, supra note 7, at 163.

\(^{39}\) Langdon, supra note 14, at 25.

\(^{40}\) Form-Based Codes Inst., supra note 8.

\(^{41}\) See id. (“Form-based codes address the relationship between building facades and the public realm, the form and mass of buildings in relation to one another, and the scale and types of streets and blocks.”).

\(^{42}\) Parking lots are to be located in the back of the building, if they exist at all. These street requirements also emphasize on-street parallel parking on each street. By creating a physical barrier of parked automobiles that clearly separate pedestrian-filled sidewalks from moving vehicles on the road, the street requirements of form-based codes give pedestrians a sense of protection, thus making for a better walking environment. For people who drive, on-street parking further “supports pedestrian life by delivering people [directly] to the sidewalk.” DUANY ET AL., supra note 1, at 71.

\(^{43}\) Arlington County, Virginia, amended its zoning ordinance, relieving small properties of on-site parking requirements in the Columbia Pike Special District, through an optional form-based code. Memorandum from Ron Carlee, County Manager to the County Bd. of Arlington, VA, Columbia Pike Form-Based Code, Adoption of Proposed Zoning Ordinance Amendments 7 (Feb. 25, 2003), available at http://www.arlingtonva.us/Departments/CHPD/forums/columbia/current/pdf/formbase_022503.pdf.
intimate place than what typically results under conventional zoning ordinances: strip malls with parking in the front and wide avenues that are difficult for pedestrians to cross.

Strengthening the character of an area, along with providing for a mix of land uses, permits form-based codes to create more active and lively neighborhoods. These improvements make for a more desirable place to live, possibly creating opportunities for a larger tax base and increased economic development. Form-based codes are economically beneficial in other contexts as well. When implemented in greenfield development projects, they are considerably less expensive for municipalities than sprawl because form-based codes promote higher-density patterns, which require less infrastructure to maintain. The expense of maintaining miles of roads, landscaping, and water lines is reduced when compared to the sprawling results of conventional zoning. Economic studies have demonstrated that form-based codes, when compared to conventional zoning ordinances, generally enhance the long-term value of areas in which they have been implemented.

Another distinguishing characteristic of form-based codes is their predictable nature. Conventional zoning suffers because it only prescribes a certain use and minimally regulates form through floor-area ratio, height, and minimum setbacks. Form-based codes are prescriptive—they can “define building types, streets and the public realm down to the block-level,” ensuring a predictable result of what will be built. Unlike conventional zoning ordinances, form-based codes physically illustrate the types of facades, buildings, and building sizes that can be built in different

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44 The use of property is not completely ignored by form-based codes, rather, it is relegated to secondary status. This allows for the separation of some incompatible land uses, such as disconnecting heavy industry from residential areas.

45 The tax base may be further increased because form-based codes endorse higher levels of density and, therefore, a larger taxable population. In Leander, Texas, the adopted form-based code, a variant on the SmartCode, is estimated to produce an additional $0.8 billion in tax base value. SmartCode Complete, http://www.smartcodecomplete.com/learn/links.html#studies (follow “Case Studies” hyperlink; then scroll to “Economic Impacts”) (last visited Aug. 11, 2008). Investment in Leander is expected to be twice as much under the form-based code than it would be under a conventional zoning ordinance. Form-Based Codes Catch On, In City and Suburb, NEW URB. NEWS, Jan.-Feb. 2006, at 14, available at http://gatewayplanning.com/New%20Urban%20News/New%20Urban%20News%20Jan_2006.pdf [hereinafter Form-Based Codes Catch On].


49 Sperber, supra note 11, at 78.
areas throughout a city. The predictability for citizens and developers that form-based codes assure allow for clear instruction on building that will save time, money, and eventually generate more revenue for municipalities than what was previously possible under the conventional code.\textsuperscript{50} Because the specific form of an area will have already been agreed upon during the code’s drafting period, much less conflict will result over future development once the form-based code is in place.\textsuperscript{51}

Predictability not only reduces future conflict, but will also make it easier for land owners to determine in advance that their project is compatible with the local code.\textsuperscript{52} The building, public space, and street standards that comprise a form-based code are all illustrated to demonstrate what is allowed to be built. Conversely, conventional zoning ordinances are predominately composed of text specifying what is not allowed to be built, thus opening the door for much interpretation and conflict amongst neighbors and other residents. Use of easy-to-comprehend diagrams and graphics reduce the amount of paper work in a form-based zoning ordinance,\textsuperscript{53} yet still provides a clear example of what building or street type is permitted. The clarity that form-based codes afford alleviates the burden imposed on a developer during the administrative approval process.\textsuperscript{54} Once adopted, in either a mandatory or optional format, form-based codes expedite the permitting process, thereby saving the landowner both time and money.\textsuperscript{55} Conventional zoning often requires that landowners receive approvals from three separate bodies in order to receive a project permit: the planning commission, city council, and design

\textsuperscript{50} See City of Miami Planning Department, Miami 21: Fact Sheet 1 (2007), available at http://www.miami21.org/PDFs/miami21factsenglish.pdf (stating that the form-based code Miami is currently drafting “will provide more clear and specific guidelines and will therefore diminish the need for amendments or corrections” and will also create “a more stable environment for investment”).

\textsuperscript{51} See Sperber, supra note 11, at 78–79 (stating that critics of conventional zoning contend that lack of a predictable structural appearance invites conflicts).

\textsuperscript{52} See PETER KATZ, EIGHT ADVANTAGES TO FORM-BASED CODES, at ¶ 6, available at http://www.formbasedcodes.org/advantages.html (asserting that nonprofessional landowners are especially advantaged by the use of graphics because of their non-technical quality).

\textsuperscript{53} See Sperber, supra note 11, at 78 (arguing form-based codes “can be just a few pages for a development that would need dozens of pages in conventional zoning documents”). But see Nicole Stelle Garnett, Save the Cities, Stop the Suburbs?, 116 YALE L.J. 598, 627 (2006) (book review) (suggesting that some form-based codes include “hundreds of pages” of renderings and photographs of appropriate building types). Even if some form-base codes are lengthy, a full page of text is considerably more difficult to comprehend than a page filled with graphics.

\textsuperscript{54} Because of the predictable results assured by form-based codes, the discretionary review process will be streamlined and met with considerably less opposition than conventional zoning allows. Form-based codes provide the municipality “with something to approve of instead of merely to oppose.” John Barber, Splicing the DNA of Sprawl Could Produce a Better Code, GLOBE & MAIL CANADA, Sept. 11, 2007, at A15, available at LEXIS, News Library, GLOBLML File.

\textsuperscript{55} See id. (highlighting that form-based codes are attractive to developers because they “can help speed approval of their projects”).
On the other hand, a form-based code requires that the landowner will only have to get the approval of the design review board.56 Municipalities also enjoy the streamlined planning process since it lightens the administrative workload and allows for better cooperation with property owners.57 Most conventional “municipal codes give builders ‘utterly inadequate direction’ about what their projects should look like . . . [a]s a result, most communities ‘have to beat each project into shape one at a time through discretionary review processes.”58 The advantageous nature of form-based codes will be demonstrated once the initial development projects are approved and commence. As other landowners realize the benefits of following a form-based code, they will be inclined to follow suit either in their local jurisdiction, if the code is optional, or will demand that the option be made available in the area they seek to develop.

Unlike conventional zoning, form-based codes can also be designed to incorporate local architecture and historical buildings.60 By prescribing a certain building standard up front, form-based codes are particularly compatible for urban infill areas destined for redevelopment.61 They allow for a level of harmonization between old buildings and new development that is unachievable under many existing zoning ordinances.

Because of their prescriptive nature, form-based codes have been criticized as “prohibitively expensive” for local governments to implement if the codes are to be adopted to regulate larger areas.62 This criticism stems from the belief that the high levels of physical detail in form-based

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57 Id.
58 The mandatory form-based code adopted by Petaluma, California, “considerably simplified the approval process, so that developers following the [form-based code], only have to go through design review, significantly reducing the approval process. This streamlined planning process not only pleases developers, but the City also likes it because it is easier to respond to developers and the community gets the type of development it wants.” Local Government Commission, Success Stories: Petaluma Gets SmartCode, HEALTHY TRANSP. NETWORK, Dec. 13, 2005, available at http://www.healthytransportation.net/view_resource.php?res_id=19&cat_type=revital.
59 See Langdon, supra note 14, at 27 (quoting Paul Crawford, a certified planning and building director with over thirty years of experience).
60 See DUANY ET AL., supra note 1, at 174–75 (noting the threat to a place’s character that is caused when new buildings do not emulate the historic architecture in the immediately surrounding area).
61 See Duany & Talen, supra note 2, at 1462 (recommending SmartCode in urban infill areas); see also Katz, supra note 52, ¶ 5 (noting that form-based codes “work well in established communities,” because historic and vernacular buildings “can be easily replicated, promoting infill that is compatible with surrounding structures”). Form-based codes can also be used to incorporate LEED standards into future construction, which would promote more environmentally friendly buildings and places. See Smart Code Complete, All About the Code, http://www.smartcodecomplete.com/learn/facts.html (last visited Aug. 12, 2008) (emphasizing that the form-based codes can be coordinated to include other land use disciplines, such as LEED environmental performance standards).
62 See Langdon, supra note 14, at 28 (quoting land use attorney and planning consultant Joel Russell).
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CANCALING codes makes coding an entire community, unless it is a very small place, uneconomical. Despite this criticism, larger cities such as Louisville, Kentucky, and Miami, Florida—which is currently adopting a new mandatory code—have proven that form-based codes can be implemented in both geographically larger and more populated communities without costs becoming an ultimate deterrence to local governments.

When form-based codes are adopted over larger geographic areas, municipalities usually incorporate a Transect in order to optimize the benefits of the underlying code. Transects are geographic cross-sections used to establish a sequence of environments—a continuum that properly regulates the intensity of development, from rural to urban.

Diagram 1: Urban-Rural Transect

There are six zones within the Transect system: T1 natural, T2 rural, T3 suburban, T4 general urban, T5 urban center, and T6 urban core. These zones are segmented into discrete categories, not all of which must


Transect zones are primary components of the SmartCode, a popular model form-based code. SMARTCODE 9.0, supra note 46, art. 6, tbl.1.

Duany & Talen, supra note 2, at 1453–54. New Urbanists argue that the Transect “better integrate[s] natural and urban systems [when compared to conventional zoning] because one is defined” in relationship with the other. Id. The SmartCode is a model form-based code operating within the Transect. Smart Code Complete, supra note 61.


CONGRESS FOR THE NEW URBANISM, supra note 56, at 36.
be used in a particular code. After a local government designates different sections of its city to certain Transect zones, the entire jurisdiction can then be regulated by a form-based code, with varying specifications for each zone.

The concept of the Transect, a common component of form-based codes, enables some of the benefits of such codes to be fully realized. For example, form-based codes regulating a single neighborhood will create a more pedestrian-friendly neighborhood, encouraging more walking and less driving and therefore a healthier population and sustainable environment. Encouraging a pedestrian-friendly community is especially important for those groups that are most adversely affected by the nation’s auto-oriented society—the young and the elderly—who regularly rely on others for mobility. These groups of people have particularly suffered from sprawl, which has been shown to lead to “excessive dependence on automobiles.” Additionally, sprawl inflicts tremendous costs to society, totaling seventy-two billion dollars annually nationwide—a result of lost time and fuel spent in traffic. Where many neighborhoods are smaller entities within the larger Transect, operating under a single municipal code, they can be connected by the same mass transit system. Mass transit systems enable individuals who prefer to live in a less dense Transect zone to have the ability to commute to the workplace, typically located in a denser urban zone, without relying on driving. Even if a mass transit system proves unfeasible in a given municipality, the adoption of form-based codes within a Transect will ultimately reduce the distance between home and work, since more compact development is possible than under conventional zoning. At the very least, driving distances will be reduced.

C. Adoption of a Local Code is Necessary to Realize the Benefits of Traditional Neighborhood Design

The basic advantages that form-based codes possess over conventional zoning ordinances have led to a recent increase in support for these new

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70 See DUANY ET AL., supra note 1, at 115–24 (emphasizing that sprawl severely limits the mobility of eighty million Americans who are either too young or too old to drive). Sprawl also burdens those who act as chauffeurs to the young and elderly. Id. at 117–18.


72 Id.

73 See Sperber, supra note 11, at 79 (noting that form-based codes are well-suited to address smart growth issues including transit-oriented development). Transit-oriented development seeks to reduce reliance on the automobile by expanding public transit options that are within walking distance of transit stations. Salkin, supra note 31, at 833.
codes in the United States. In order to realize the benefits of cohesive traditional neighborhood design, local governments must first adopt such a code. It is certainly possible for a developer to apply for a variance or request that his property be rezoned to allow for mixed land use and the incorporation of other traditional urban features. However, this approach is problematic because different development projects will not be regulated by a unifying code and will lack the cohesiveness of developments regulated by a single form-based code. Furthermore, the rezoning process can be incredibly time-consuming and is by no means assured.

This dilemma was exemplified in I’On, L.L.C. v. Town of Mt. Pleasant, where a traditional neighborhood development, known as I’On, was delayed for five years in a jurisdiction with a conventional zoning ordinance. The developer applied to have the land rezoned to allow for the project to be built, which was impossible under the existing ordinance that permitted only single uses. After the local Zoning Board recommended approval of the rezoning, the Town Council narrowly denied the rezoning application. The developer then modified the plan and reapplied for rezoning. Once again the Zoning Board recommended that the rezoning be approved; this time the Town Council voted in favor of the developer and granted the rezoning. Following the Town Council’s approval, conflict arose when a small group of Mount Pleasant residents opposed the rezoning by petitioning the Town to change the ordinance or, if that failed, to submit the issue to voters for referendum. In response, the developer filed a lawsuit against the Town seeking declaratory judgment on the legality of zoning by referendum. Ultimately, the case made its way to the state supreme court, which held that zoning by referendum was not allowed in South Carolina. After five years of delay, the developer was finally able to proceed with the construction of a traditional neighborhood development.

Despite the fact I’On is an award-winning and thriving community

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74 See Bill Van Siclen, New Urbanists Choose Providence for Conference, PROVIDENCE J. BULL., May 28, 2006, at A1, available at LEXIS, News Library, PRVJNL File (noting the support for form-based codes in New England); see also Curtis, supra note 11 (stating that form-based codes have recently been adopted across “the United States within the past five or six years”).
76 Id. at 718.
77 See id. (“[T]he Town Council, which makes the final decision on all zoning matters, denied [the developer’s rezoning] in a 5–4 vote.”).
78 Id.
79 Id.
80 Id. The petition acquired the number of signatures necessary by law (fifteen percent of Town electors) and a referendum was eventually scheduled. Id.
81 Id.
82 Id. at 725.
today. I’On, L.L.C. demonstrates the legal obstacles that conventional zoning presents to achieving development that mimics the design of a traditional neighborhood. Many other developers would have lacked the determination to continue a legal battle, such as the five-year ordeal that was present in I’On, L.L.C., and scuttled the traditional neighborhood plans. Moreover, the prolonged administrative process and litigation deters future developers from conforming to traditional neighborhood design when the only avenue to achieve it is through a rezoning application. The result is that most developers will choose the easy route and develop property in compliance with existing single use zoning, leading to the construction of unexceptional suburban sprawl. Altering provisions to incorporate traditional neighborhood features into the existing code has also proved problematic. However, had the Mount Pleasant town government and community adopted a form-based code, the administrative and judicial delays could have been entirely avoided.

Naturally, before the adoption of any form-based code can occur, the code itself must be drafted. Unlike conventional zoning ordinances, the local community plays an active role in the creation of form-based codes. This step requires that interested community members assume an active role in the creation of the future shape of their neighborhood by gathering together in a series of charrette meetings. Even proponents of form-based codes will admit that one disadvantage in implementing a new code is that the drafting process can be time-consuming and expensive. Building a community-wide consensual vision of a place “takes time, patience, and resources.”

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84 See Emerson, supra note 3, at 668 (describing the challenges I’On’s developer faced). Architect and form-based code proponent Andres Duany “has acknowledged that I’On could have been better, largely because the zoning process nixed plans for apartments, townhouses and more stores.” Behre, supra note 83 (emphasis added). Even though I’On has ultimately been a successful development, had a form-based code been adopted in Mount Pleasant, I’On would have achieved even greater success by including many of missing features that Duany complained were lost through the conventional zoning procedure.

85 Petaluma, California, experienced nearly seven years of delay in trying to entirely replace its existing ordinance with a specialized conventional zoning code developed strictly for its downtown revitalization project. See Local Government Commission, supra note 58. “The thick text of legalese, incomprehensible floor area ratios, and long charts of numbers”—all of which were necessary to redraft Petaluma’s conventional code—“did not assure the community that the new development would mimic the existing historic downtown.” Id. Only when the city decided to adopt a modified version of the SmartCode tailored specifically for Petaluma did this “major barrier” subside. Id.

86 The drafting process can be made by using a customized version of the SmartCode and tailoring it to the vision for a particular municipality. SmartCode Complete, All About the Code, http://www.smartcodecomplete.com/learn/facts.html (last visited Sept. 15, 2008).

disincentive for adopting a form-based code, the numerous long-term benefits of adopting a new code outweigh this initial inconvenience. Although developing a community vision can be a daunting task, as it was in Arlington County, Virginia,\(^88\) many municipalities have been able to create the community vision necessary to draft form-based codes in much less time than originally feared.\(^89\) Furthermore, because form-based codes are developed through a procedure involving “strong community participation,” the number of project appeals is reduced since residents have an expectation on how future projects will take shape and therefore are less likely to challenge permit approvals from the local design review board.\(^90\)

The adoption of form-based codes provides landowners with the legal right to develop their property in a way that produces a place with the valuable attributes that adorn the nation’s traditional cities and towns. From a policy standpoint, municipalities should be inclined to favor a form-based alternative to conventional zoning. Form-based codes save both time and money for local governments and developers. Most importantly, form-based codes create an attractive and unique place in relation to other communities by conferring the benefits of a traditional neighborhood. Conventional zoning acts as a legal barrier to traditional development, which because of its nature doubles as sustainable development. Local governments and residents must inquire what is more desirable for their city: a place where residents have limited public interaction or a community designed to enlarge the public realm and encourage a healthy citizenry. If the latter is the more appealing choice, the legal impediments that hinder its development must be removed by adopting a form-based code in either a mandatory or optional format.

III. MANDATORY FORM-BASED CODES

In the municipalities where they are possible, mandatory form-based codes should be adopted. Instead of having small pockets of form-based development within a larger area regulated by a conventional zoning ordinance, a result theoretically possible under an optional form-based code, a mandatory code ensures that new development will be cohesive

\(^88\) See infra text accompanying notes 157–58.

\(^89\) Hercules, California, was able to adopt a mandatory form-based code for a new town center after only a ten-day community-wide charrette produced a common vision. CITY OF HERCULES & DOVER KOHL, & PARTNERS, CENTRAL HERCULES PLAN, ACTION, (2001) http://hercules-plan.org/action.htm. The charrette was funded by the “key landowners and developers” and the municipality’s Redevelopment Agency, who matched the landowners’ commitment “dollar-for-dollar.” Id. With the input gained from the community charrette, the planning was able to draft a report, regulating plan, and two design codes. Id.; see also infra note 158 (noting the short length of time and little expense necessary for other community charrettes).

\(^90\) See CONGRESS FOR THE NEW URBANISM, supra note 56, at 62 (using the SmartCode as an example to demonstrate how form-based codes potentially reduce the number of appeals).
and predictable in a given area. Existing conventional zoning will be entirely replaced by an exclusive form-based code throughout an entire city or in a designated area within a municipality. This cohesion best achieves what form-based codes are designed to accomplish: namely, to create a desirable, healthy, and pedestrian-friendly community.

A. Current Legal Framework Allows Form-Based Codes

The structure of form-based codes represents a rather dramatic shift away from legally accepted conventional zoning, but little—if any—debate exists over the legality of the new codes. Although conventional zoning has received both federal legislative\(^91\) and judicial\(^92\) approval, implementing alternative zoning practices, such as a form-based code, is not illegal. The Standard State Zoning Enabling Act (“SSZEA”) is the model act that serves as the framework for many state enabling acts, which permit local governments to enforce zoning ordinances.\(^93\) While the SSZEA allows single use zoning,\(^94\) it also permits regulation based on form.\(^95\) In fact, none of the purposes enumerated in the SSZEA “limit[s] . . . regulation to the use of land.”\(^96\) Even in states with relatively strict enabling acts, form-based codes have recently been implemented.\(^97\) Village of Euclid only upheld use-based zoning as a constitutionally permissible regulatory tool, leaving local governments the authority (within the scope of their police power) to enact zoning regulations that protected public safety, health, and general welfare.\(^98\) Because

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\(^93\) Emerson, supra note 3, at 652.

\(^94\) See Sitkowski & Ohm, supra note 7, at 166 (explaining “that most state enabling statutes take land use, and not form of development, as their touchstone”) (emphasis omitted).

\(^95\) Id. at 166–67. The SSZEA does not even show a preference for use-based over form-based codes; in fact, it expressly recommends that “the character of the district” shall be considered when drafting local land use regulations. See id. (quoting SSZEA, supra note 91, § 3).

\(^96\) Id. at 167. The SSZEA specifically stipulates that the main purposes of zoning regulations shall be “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;” and to facilitate adequate provision of “public requirements.” SSZEA, supra note 91, § 3. All of the aforementioned purposes can be met through the implementation of form-based codes.


\(^98\) Village of Euclid v. Amber Reality Co., 272 U.S. 365, 387 (1926) (stating that all ordinances “must find their justification in some aspect of the police power, asserted for the public welfare”).
municipalities have the authority to draft and enforce zoning ordinances that may be form-based, the adoption of either an optional or mandatory form-based code rests primarily with those local governmental entities. Mandatory form-based codes have been most successfully adopted in smaller areas, such as business districts, but have also been implemented on a jurisdiction-wide basis in both greenfield and previously developed areas, provided that landowners do not staunchly oppose adoption of a form-based code.

B. Mandatory Codes Find Success in Business Districts

Although mandatory form-based codes theoretically produce better results than optional codes, in reality they suffer from several drawbacks. The biggest challenge to implementing mandatory form-based codes is that replacing an existing zoning ordinance can create political and legal difficulties because conventional land use rights will be entirely replaced. For this reason, many jurisdictions that have adopted mandatory form-based codes have designated smaller, select areas where the code will be adopted to facilitate development, usually business centers or downtown areas. In Petaluma, California, four hundred acres of a downtown infill area have been exclusively regulated by a form-based code since the existing zoning ordinance was replaced in June 2003, but the remainder of the municipality continues to operate under the conventional zoning system. The mandatory format was adopted strictly for Petaluma’s downtown because there was a high demand within the community to preserve the “origins and identity of the city,” represented in its abandoned and underutilized industrial core. Whereas downtown Petaluma languished for nearly twenty years with little improvement under conventional zoning, the area realized immediate development under the new form-based code.

Petaluma’s implementation of a mandatory form-based code succeeded because the community developed a unified vision of how to shape its downtown. However, this consensus was not reached without debate. Nearly seven years of intense conflict predated the adoption of Petaluma’s mandatory code, although much of this debate occurred before a
mandatory form-based code was considered as an option. Once the city planners presented the form-based code as an option, the process quickly moved forward, and the new code was adopted by the city council only nine months later—with the benefit that the community’s vision of downtown Petaluma had already been hammered out.

The success of Petaluma has not been entirely replicated in Fort Meyers, Florida, despite the fact that both municipalities are operating under a mandatory provision. Members of Fort Meyers’ planning community have criticized the implementation of a mandatory form-based code that only regulates small pockets—not one connected area as in Petaluma—dispersed throughout a larger conventional zoning scheme. This urban design problem is similar to what has occurred in newer American cities such as Dallas. Downtown Dallas has over “a dozen city blocks of excellent pedestrian quality,” yet no two of these blocks are adjacent to each other. The consequence is that people cannot walk more than a short block “without being confronted by automobile-dominated banality.” Certainly, the small form-based sections of municipalities adopting a hybrid approach will be aesthetically superior to the development that would have resulted solely under conventional zoning. But these isolated parcels will not be able to attain the cohesion and area-wide walkability that occurs in larger areas that are subject to form-based regulation, which emulate traditional American cities.

If form-based codes are exclusively adopted for a commercial center or downtown area, it is best if the code applies to an interconnected region, as codes have been in Petaluma and Hercules, California. Hercules represents another municipality that wanted to attract a particular development that would “distinguish [the town] from its suburban neighbors.” Similar to Petaluma, Hercules adopted a mandatory code in 2001 to regulate approximately 425 waterfront acres of infill redevelopment at a former

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104 Id.
105 Id.
106 It should be noted that while the process’s pace increased after the form-based code was put on the table, a community vision had largely been formed by that time. Beginning in 1996, monthly meetings were held by a city-appointed, twenty-five person advisory committee assigned with the task of discussing “objectives, listen[ing] to community views and perspectives, brainstorm[ing] potential approaches, review[ing] plan concepts and giv[ing] direction on draft planning documents.” CITY OF PETALUMA, supra note 69, at 3–4.
109 DUANY ET AL., supra note 1, at 161–62.
110 Id. at 162.
111 CONGRESS FOR THE NEW URBANISM, supra note 56, at 71.
industrial site. Hercules’ new form-based code “has clearly been a success” as “development has flourished in the area it covers” since the new code was adopted. Similar to Petaluma, the Hercules mandatory code is applied to a relatively small area that is divided into four separate districts. All four of the districts are located adjacent to each other without large tracts of conventionally zoned land interrupting the tracts regulated by the form-based code. However, the remainder of the municipality remains regulated exclusively under the existing conventional zoning ordinance.

C. Absent Public Discontent, Mandatory Codes Are More Readily Adoptable

Mandatory form-based codes may also be a better option than the optional format where open space is more limited. Because form-based codes encourage density in general, areas where undeveloped land is scarce may benefit most by exclusively zoning their jurisdiction under a form-based code and not even allowing a landowner the choice of building according to the conventional zoning scheme. By requiring compliance with a form-based code, a municipality can prevent low-density sprawl and make better use of the limited land that remains within its jurisdiction. For example, one of the cited reasons for adopting a mandatory form-based code in Sarasota, Florida, was the forecast that housing development could not be sustained given the municipality’s geographic limitations. Had Sarasota implemented an optional code, the possibility would remain that certain landowners would develop their properties under the old conventional code. However, a mandatory format will be difficult to implement if enough public discord exists, in which case only an optional code would suffice.

Even in jurisdictions where open space is not an issue, mandatory form-based codes can be successfully implemented. In September 2005, Leander, Texas—a city with an abundant amount of open space—adopted a mandatory form-based code and eliminated its conventional zoning

112 Id.
116 See ECON. RESEARCH ASSOC., supra note 48, at 5 (explaining “that new housing (particularly for sale) is currently operating at a level that cannot be sustained over the long-term due to the scarcity of premium sites”).
ordinance. Over two thousand acres of land are targeted for development under the new form-based code, a majority of which will be greenfield development. 117 While the new jurisdiction-wide code will be enforced over a small section of Leander that was previously developed under the old conventional ordinance, the remainder of the jurisdiction will be exclusively developed according to the form-based code. 118 The mandatory format particularly lent itself well to Leander; the town is anticipating a population boom in the near future as a part of the growing Austin metropolitan region which Leander has been recently connected to through the extension of Austin’s commuter rail line. 119 The projected influx of 34,000 to 84,000 additional people into Leander over the next couple decades will undoubtedly produce a great physical change in the area, a change that will be regulated by a mandatory form-based code that will foster the growth of a dense, healthy, and sustainable community.

Adoption of a mandatory code was possible because the remaining greenfield space was owned by a small group of developers who shared a similar vision for the future of Leander. 120 With a small group of owners, applying a jurisdiction-wide form-based code is less difficult than in a municipality with a larger amount of landowners for two interrelated reasons. First, smaller groups of landowners will generally have fewer differences in perspective on the future development of a place. Second, the differences that do exist may be more easily reconciled between a smaller group of landowners than what would normally occur if the group was relatively numerous. Simply put, where a group of landowners can generally agree on how development will be regulated, entirely replacing existing conventional zoning with a form-based code will be easier than where landowners have conflicting views. 121

117 See Form-Based Codes Catch On, supra note 45 (noting that “Old Town” Leander, an area developed and inhabited prior to the adoption of the form-based code, only comprises part of the site to be developed).

118 The section of Leander developed under the old conventional zoning ordinance is now regulated by the form-based code. Since “Old Town” has already been constructed under conventional zoning practices, only future redevelopment in this area will have to comply with the form-based code.

119 See Form-Based Codes Catch On, supra note 45 (stating that Leander, Texas, is expecting its population to be between 50,000 and 100,000 from its current population of 16,000); Capital Metro Transit Home Page, http://www.capmetro.org (follow “All Systems Go!” hyperlink, then “Capital Metro Rail Stations”) (last visited Aug. 14, 2008) (showing a recently completed Leander station that is connected to downtown Austin). Leander demonstrates how form-based codes can be used in conjunction with transit-oriented development to produce pedestrian-friendly communities that are connected to a region’s larger cities, without necessarily relying on the automobile as the primary mode of transportation between town and city.

120 See Langdon, supra note 14, at 27 (highlighting the fact that two thousand acres of land was owned by only seven separate property owners).

121 See infra Part IV.A (noting that mandatory form-based codes are met with more political opposition than optional codes because they entirely replace land use rights).
D. Applying Jurisdiction-Wide Mandatory Codes in Previously Developed Areas

While some cities that were previously developed under a conventional zoning ordinance have applied form-based codes to particular sections of their jurisdictions, such as Hercules and Petaluma, other conventionally developed communities have applied a mandatory code to the entire jurisdiction. Unlike the situation in Leander, where much of the affected land was undeveloped, Sonoma, one of California’s oldest cities, applied a mandatory form-based code to the entire jurisdiction in 2001.\textsuperscript{122} Sonoma’s mandatory code integrates the city’s existing development by separating the city into thirteen planning areas and placing each of these areas into one of four categories—commercial corridor, commercial district, open space, or residential.\textsuperscript{123} Once Sonoma categorized areas according to the area’s previous use under the conventional zoning ordinance, the city was able to individually study each area and devise a plan that would eventually allow existing development to conform to the new form-based code in the future.\textsuperscript{124} This process will allow Sonoma’s mandatory code “to recognize existing development while imposing a new regulatory framework on future development.”\textsuperscript{125}

By analyzing each of the thirteen planning areas individually, Sonoma will be able to focus on determining the steps that will be required to bring the existing structures in each district into conformity with the form-based code. In the Four Corners planning area, the city found that “[a]ll of the developed parcels contain structures and uses that could be expanded, replaced, or otherwise modified to the benefit of the landowners.”\textsuperscript{126} Because of this, the Four Corners district has been proposed for mixed use development.\textsuperscript{127} The location and existing physical structures of other planning areas allow for a different design. The Southeast Edge area of Sonoma was previously a residential area, but the city determined that under the new form-based code, a neighborhood grocery store could be built, which would serve the citizens in the immediate area, as well as the


\textsuperscript{123} LGC, FORM-BASED CODES, supra note 113, at 5.

\textsuperscript{124} See id. (“Within each area, the existing situation was inventoried and compared to the desired future state.”).

\textsuperscript{125} Id.


\textsuperscript{127} See id. (stating that “the proposed land use . . . foresees a mix of residential, retail, and office uses that will enhance Sonoma’s southern gateway and fulfill existing economic demand in the community”).
additional population that will arrive upon the construction of multifamily housing—previously not allowed under the conventional code. The specified vision of the Southeast Edge planning area will accomplish two of Sonoma’s community goals that the form-based code has been designed to achieve: the increase of affordable housing and the creation of a denser and less automobile-reliant city. Once municipalities have individually studied and analyzed previously developed areas, they will be able to better incorporate them into a new mandatory form-based code. Depending on the existing development, certain areas will lend themselves well to particular Transect zones that comprise the form-based code.

For example, developed areas with lower densities are suitable for the T3 suburban zone, whereas areas with high densities can be targeted for more intense development typical of the T4, T5, and T6 urban zones.

It is important to keep in mind that in Sonoma—and for every other municipality that has adopted a mandatory code—the public shared a general community vision for the future shape of their city. Furthermore, demand for mixed use and high density development, typically induced by form-based codes, existed in the local real estate market at the time Sonoma’s code was drafted and adopted.

IV. OPTIONAL FORM-BASED CODES

A. Difficulties to Implementing Mandatory Codes

Although the mandatory format will guarantee that the benefits of form-based codes will be realized within a jurisdiction, the physical result produced by this new zoning concept is not universally favored. The fact remains that some developers and other property owners are simply accustomed to and accept the physical consequence of conventional codes.

128 Id. at 7. In Sonoma’s Southeast Edge, the current population is too small for a grocery store to generate enough business to profit. Id. Only with the increased population density provided by multifamily housing will a grocery store survive. Id.

129 Sonoma listed several goals for its mandatory form-based code to attain, including that “[h]ousing [be] available and affordable to the residents and the local workforce to support an economically diverse population,” and, second, that “[w]alking and bicycling [be] safe,” public transit is popular, and “[t]raffic congestion is mitigated.” SONOMA, 2020 GENERAL PLAN, supra note 122, at 2.

130 See supra text accompanying notes 65–69 (discussing the use of the Transect with form-based codes).

131 See SONOMA, 2005 GENERAL PLAN, supra note 122, at 3 (emphasizing that new code “is based on a set of principles that has consistently represented community direction for several decades as reinforced during the course of” Sonoma’s visioning process for the new code).

132 See SONOMA, 2005 GENERAL PLAN, supra note 122, at 3 (noting that Sonoma “real estate market and property owners generally favor residential development with buffering ground-floor retail uses along the major streets”).
zoning—sprawling development. Conventional zoning typically allows a land-owner more private space than what is typically provided on property tracts regulated by a form-based code. In suburban areas, the larger plots of land produced by conventional zoning strike a balance between nature and civilization, two ideals revered by the “American national character.” Because form-based codes have been associated with higher-density development, and therefore a more public and less private lifestyle, citizens who staunchly oppose such a way-of-life will disfavor the adoption of a mandatory form-based code. This is especially true in areas located outside a city or town’s commercial center, places where higher density, mixed use development is more widely accepted. If public support is lacking, it will be unlikely that local governments will mandate an exclusive form-based code.

It must be realized that form-based codes do not entirely abolish familiar suburban development and, in fact, form-based codes even allow for such development in certain areas. Notwithstanding this reality, the central dilemma confronting the adoption of mandatory codes is that the uneducated public may perceive a form-based code as an eradication of familiar suburban development and possible reduction in property values.

Another frequently mentioned fear is that a complete overhaul of the zoning ordinance will require previously approved developments and projects under the conventional code to be approved again under the new mandatory form-based code. This fear is unmerited, however, as mandatory form-based codes have allowed all projects that have been approved under the old conventional ordinance to continue as originally planned. Exemplary of this allowance is Sarasota’s new mandatory code, which clearly answers these apprehensions by stating that “[a]ll existing buildings will be permitted to remain in their current use, form, and design

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133 Most Americans have been raised in sprawling suburbs and might be more comfortable residing in an area with low population density than a higher density area. Since 1970, “[m]ore Americans have lived in the suburbs than in central cities.” Garnett, supra note 53, at 630.

134 Although form-based codes are characterized as favoring smaller tracts of property, this loss of private real estate is partly offset by a gain in public open space, the creation of which is encouraged by form-based codes.


136 As a model form-based code, the SmartCode allows for both “rural” and “suburban” development within the T2 and T3 Transect zones. See supra diagram accompanying note 67. These areas, if incorporated into a local form-base code, would allow for larger parcels of land than the denser urban zones.

137 See CONGRESS FOR THE NEW URBANISM, supra note 56, at 37 (explaining that educating the public is the “most important tool” for successfully implementing form-based code).

138 See id. (stating that local governments need to demonstrate to the public that form-based codes “will not cause property values to go to hell”).
unless they are redeveloped.  It is only after the form-based code officially goes into effect that improvements to buildings or new construction on empty parcels of land will be regulated under the parameters of the new code. Therefore, existing buildings remain in their current physical state until they are renovated.

In some communities, even the Takings Clause of the Fifth Amendment has been cited as a hindrance to the implementation of mandatory form-based codes. When Arlington County, Virginia, sought to adopt a form-based code as a way to encourage development along the Columbia Pike Road, the county eventually decided not to implement the code in a mandatory format, adopting it as optional instead. Even though the county government desired to “direct and control the type of development” that would occur, the optional format was strategically “chosen by the county in order to avoid any potential ‘takings’ issues.”

The Takings Clause of the Fifth Amendment does not present a substantial obstacle to the adoption of form-based codes. Courts have consistently rejected takings challenges against smart growth initiatives, which can be employed through form-based codes. The Supreme Court has even gone far enough as to endorse the use of land use regulations that control sprawl emphasizing that it is legitimate “for local governments to discourage ‘the premature and unnecessary conversion of open-space land to urban uses.’” Despite the fact that takings challenges pose no legitimate threat to mandatory form-based codes, the fear of such legal contests was enough to lead Arlington County to adopt an optional code rather than a mandatory one.

In some municipalities the apprehensions over reduction in property values, altering previously approved projects to conform to the new code,
and the threat of takings challenges can turn public perception against a universal form-based code. These misguided public fears, if present, will hinder the adoption of a jurisdiction-wide mandatory form-based code. The solution is the adoption of an optional form-based code, which will allow the landowner the choice of whether their property will be developed according to a municipality’s form-based code or the conventional ordinance.

B. Optional Codes as an Alternative to the Mandatory Format

Acting as an alternative to a mandatory format, optional form-based codes offer many of the benefits associated with form-based development while simultaneously reducing the political conflict that sometimes accompanies the adoption of mandatory codes. There are two general types of optional form-based codes: a parallel, or overlay zone format and a floating zone format. Parallel codes allow the adoption of an optional form-based code, but only to supplement the existing conventional ordinance, typically applying throughout a jurisdiction.\(^{147}\) An alternative way to implement an optional form-based code is a floating zone, where the new code is written into the existing zoning ordinance, but is not mapped in any specific location.\(^{148}\) Rather, a landowner can opt to use the form-based code which effectively floats to the area of development and replaces the base conventional zoning code.\(^{149}\) Unlike the parallel format that has a mapped regulating plan, the unmapped floating zone format does not require such a regulating plan.\(^{150}\) Instead, a regulating plan is prepared on an ad hoc basis for new development,\(^{151}\) designed specifically for each project instead of a uniform plan that applies jurisdiction-wide. The benefit of the floating zone format is that it generally allows for the form-based code to be adopted more quickly and with less expense than alternative formats.\(^{152}\) Theoretically, floating zones suffer in that the physical results will vary if there are multiple projects within the same jurisdiction, whereas a parallel code will ensure that all projects in a jurisdiction will conform to the same regulating plan. Regardless of whether a parallel or floating zone format is used, both optional formats allow landowners the choice to develop land according to either the base conventional code or the new form-based code.

Once an optional form-based code is adopted, any landowner who decides to develop property according to the new code’s regulations will

\(^{147}\) CONGRESS FOR THE NEW URBANISM, supra note 56, at 31.
\(^{148}\) Id.
\(^{149}\) Id.
\(^{150}\) Id.
\(^{151}\) Emerson, supra note 3, at 674.
\(^{152}\) Id.
be free from the threat of legal challenges, such as the one that nearly derailed the development in *I’On, L.L.C.*153 The legal argument in *I’On, L.L.C.* was that the zoning variance applied for by the developers was illegal.154 However, once an optional form-based code is adopted, any subset of a city’s population that staunchly opposes such development will not be able to attack it as illegal. Any such conflicts will have been resolved once the optional code has been adopted. The property owner simply has to choose to develop according to the regulations set forth in the given municipality’s form-based code and will be able to proceed without the threat of a lawsuit, which impeded the development in *I’On, L.L.C.* Additionally, it is likely that local dissatisfaction will not arise given the general success of areas regulated by form-based codes and the fact that once the optional code is implemented,155 the public will realize that any prior apprehensions they harbored were misguided.156

As previously mentioned, one drawback to adopting form-based codes is the possibility of a time-consuming drafting process. The creation and eventual adoption of the Columbia Pike form-based code, located in Alexandria, Virginia, presents an extreme example. There, the Columbia Pike Revitalization Organization and county staff embarked on a 150-meeting, two-year educational and drafting process with neighborhood, business, and property owner groups to produce a form-based code reflecting the community’s consensus of the future shape of Columbia Pike.157 The Columbia Pike form-based code was adopted as a parallel zoning ordinance in February 2003.158

Although Columbia Pike’s community educational and drafting process was certainly time-consuming, its two-year length is atypical. Other optional form-based codes have been created in a shorter time period with fewer meetings and with little expense, such as the optional codes adopted in Flowood, Mississippi and Montgomery, Alabama.159 In fact, one distinct advantage of the optional format over a mandatory format is a

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153 See *supra* text accompanying notes 75–84 (examining the legal challenge to *I’On* development). The *I’On* development was not a form-based code per se, but contained similar traditional neighborhood development features that pose the same difficulty to implement under the existing regulations of a conventional, single use zoning ordinance.

154 *Id.*

155 See *supra* text accompanying notes 45–50 (predicting economic success in areas that are regulated by form-based codes).

156 See *CONGRESS FOR THE NEW URBANISM, supra* note 56, at 37 (explaining that once the local public is educated about form-based codes and they realize that property values will not be negatively affected, they “will be much more excited about this form of development”). If any dissatisfaction exists, it will arise before the form-based code has been adopted.


158 *CONGRESS FOR THE NEW URBANISM, supra* note 56, at 67.

159 The optional form-based codes adopted in Flowood, Mississippi, and Montgomery, Alabama, took approximately three months and seven months respectively, at a cost of roughly five thousand dollars. *Emerson, supra* note 3, at 674 n.213.
decrease in the amount of time and resources required to create a new code. Had Columbia Pike’s form-based code been mandatory in format, rather than optional, it is likely that the drafting and adoption period would have even increased. Because the adoption of either a parallel or floating zone code merely offers an additional development option for landowners, conflict between interested groups will be decreased.\textsuperscript{160}

C. Incentives Offered by Optional Form-Based Codes Have Enticed Developers

Even though the code is optional, developers have taken interest in following Columbia Pike’s form-based code over the conventional zoning ordinance for several reasons. One reason relates to predictability, an inherent attribute of form-based codes.\textsuperscript{161} High compliance with the Columbia Pike form-based code has been achieved partly because “developers have been attracted by the code’s ‘predictability,’ which makes it much easier for developers to show the community that their plans” conform to the community’s vision.\textsuperscript{162} Columbia Pike has experienced an economic surge as more and more developers have designed their projects according to the form-based code.\textsuperscript{163} By October 2004, the city, which had just a year before been losing development projects to other towns, approved over three-hundred million dollars in new projects that complied with the recently adopted form-based code.\textsuperscript{164}

Outside the inherent benefits of all form-based codes, individual codes provide other enticements. Optional form-based codes have been drafted including incentives to encourage developers to build according to the new code. Flagstaff, Arizona’s new floating-zone form-based code offers reduced architectural review fees and reductions in natural resources calculations for landowners choosing the new code.\textsuperscript{165} Columbia Pike’s form-based code also provides incentives, including relieving small properties of on-site parking requirements, thereby providing landowners greater flexibility to redevelop their properties.\textsuperscript{166} Additionally, to encourage use of a new form-based code, Gulfport, Mississippi’s optional

\textsuperscript{160} Id. at 672 (noting that the SmartCode reduces political conflict when adopted in parallel code format). The same holds true for floating zone codes, which offer increased development options as well.

\textsuperscript{161} See supra text accompanying notes 51–54 (discussing predictability of form-based codes).

\textsuperscript{162} Caulfield, supra note 157 (citing opinion of Tim Lynch, executive director of Columbia Pike Revitalization Organization, a nonprofit group that works with the county).

\textsuperscript{163} See Madden & Spikowski, supra note 87, at 176 (emphasizing that since Columbia Pike’s form-based code was passed, a “vast majority of development proposals” have elected to use the form-based code over the conventional zoning ordinance).

\textsuperscript{164} Caulfield, supra note 157.

\textsuperscript{165} FLAGSTAFF, ARIZ., LAND DEVELOPMENT CODE ch. 10-17, art. 1.6.1 (c)-(d) (2007).

\textsuperscript{166} See CONGRESS FOR THE NEW URBANISM, supra note 56, at 69 (analyzing Columbia Pike form-based code).
code specifies that applications submitted under the form-based code are subject to an expedited process and will receive priority over those submitted in accordance with the existing conventional ordinance.\footnote{167} The benefits of form-based codes have resulted in developers choosing those codes over conventional zoning ordinances in jurisdictions where landowners have the choice to develop according to either zoning regulation. The aforementioned economic success of Columbia Pike’s optional form-based code has been well-documented, yet this is not the only example, as developers have clearly demonstrated a preference in using form-based codes over conventional zoning ordinances in other jurisdictions. In 1999, Miami-Dade County adopted an optional format in downtown Kendall which overlays the prior conventional zoning ordinance.\footnote{168} Recently, Kendall is “emerging from the ground, remarkably like the 1998 master plan” contained in the form-based code.\footnote{169} Downtown Kendall has been able to take shape as originally planned under the new code because landowners have selected the form-based code—not the conventional ordinance—to regulate construction. The success of Kendall is particularly encouraging given the fact that the area has been redeveloped with an optional form-based code on a site “with multiple parcels and landowners” who have all decided to use the new code.\footnote{170} Over a dozen developers have been involved and all have found it easy to work with the form-based code because of its predictability and expected profitability.\footnote{171} Developers have also elected to use the form-based code in Montgomery, Alabama, in the sections of the jurisdiction that have an optional format. City planning director Jonathan Langley emphasized that most of the new developments have been constructed or will be constructed according to the form-based code adopted in early 2006.\footnote{172} The high degree of preference developers have given to form-based codes in jurisdictions that have adopted them in an optional format demonstrates that—even without a mandatory code—municipal governments can rely on an optional code to achieve development designed in the mold of traditional neighborhoods.

D. The Solution Where Mandatory Format is Currently Impracticable

Where political realities make it difficult to implement a jurisdiction-wide mandatory form-based code, the best possible alternative is to adopt an optional code for the entire municipality with the exception of commercial centers or other sections earmarked for key growth, which would be governed by a mandatory format. Pike Road, Alabama, adopted this format in August 2005, with three neighborhoods exclusively regulated by a form-based code, while the remainder of the jurisdiction may be developed under either the conventional ordinance or the new code.\textsuperscript{173} Adoption of the new code has since provided the framework necessary for the town to build a one billion dollar traditional neighborhood development consisting of seven hamlets within Pike Road.\textsuperscript{174} Montgomery, Alabama, has also adopted a similar format, where 730 downtown acres have been targeted for redevelopment and will accordingly be regulated by a mandatory form-based code consisting of two urban Transect zones.\textsuperscript{175} The remainder of the surrounding city will be governed by an optional overlay (parallel) code which allows for suburban and rural areas to be regulated by the form-based code at the landowners’ choosing.\textsuperscript{176}

The formats, utilized in Pike Road and Montgomery, combine the advantages of both the optional and mandatory formats. An optional form-based code should generally be able to be applied over a larger area than a purely mandatory code because it will be met with less political opposition. Adopting a mandatory format in certain key areas, such as commercial centers and downtowns, will guarantee development according to the form-based code, which is essential for these areas that demand a pedestrian-friendly environment. Because smaller downtown areas are more receptive in adopting mandatory form-based codes, local opposition to the new code will be less of a hindrance to the adoption of the mandatory format. By requiring that certain sections of cities conform to the mandatory form-based code, municipalities will likely jumpstart additional development in areas regulated by the optional format. The past success of form-based codes, both from an economic and physical perspective, makes it probable that local landowners in optional areas will choose to have their projects correspond to the form-based code once they realize firsthand that the other areas of their city regulated by the mandatory code have increased in

\textsuperscript{173} See PIKE ROAD, ALA., SMARTCODE, art. 12, § 1201.4 (2005), available at http://www.pikeroad.us/documents/smart-code-zoning-requirements.pdf (explaining that Pike Road’s form-based code is optional for the jurisdiction, except for three downtown sectors where the code is mandatory).

\textsuperscript{174} SmartCode Complete, supra note 100.


\textsuperscript{176} MONTGOMERY, ALA., SMARTCODE, art. 1, § 1.1.1 (2006).
value. Municipalities can also offer incentives to persuade landowners to choose the optional form-based code as a means of further encouragement.

One final recommendation to municipalities adopting an optional form-based code with designated mandatory areas or a purely optional format is to plan to update the code in the future to a mandatory format. Miami, Florida, is currently proceeding to follow this proposal to some degree. Miami-Dade County’s current zoning ordinance has been amended to allow for Traditional Neighborhood Development Districts—a predecessor to form-based codes—in an optional format.177 Within Miami-Dade County, the City of Miami is planning to eliminate the County’s conventional zoning ordinance with the optional traditional neighborhood development feature and adopt a purely mandatory form-based code.178

Similar to the process in Miami, an excellent way for municipalities to lay the groundwork for a mandatory form-based code is to initially implement an optional one in some capacity. Assuming that a given municipality experiences the similar degrees of community acceptance and economic success as other cities have in implementing optional codes, the foundation will be set to modify the form-based code from an optional to an exclusive format. In Miami, sections of the County have already been developed according to optional form-based codes,179 yet the limited nature of cohesive development that is permitted under the County’s current code has lead the City of Miami to replace the conventional code within its boundaries to ensure sustainable and well-managed future growth.180 Once local governments realize the community’s favorable response to an optional form-based code, implementing a mandatory code will likely be met with less conflict than if that format was used from the outset.

V. CONCLUSION

Unlike conventional zoning ordinances, form-based codes undoubtedly provide municipalities with the necessary regulatory framework to ensure that anticipated future growth conforms to the community’s vision. The higher density, mixed use, and pedestrian-friendly growth promoted by form-based codes supports a healthy human environment and predicts a result that mimics the treasured characteristics of traditional American

177 MIAMI, FLA., CODE § 33-284.46 (1997). Landowners can elect to develop from forty to two-hundred acres of their property according to this zoning alternative instead of using the conventional zoning code. Id. at § 33-284.48.
178 See Miami 21 Final Draft Code, supra note 64, at 5 (stating that new code applies to “all lands within the City”).
179 See supra text accompanying notes 165–68 (examining Miami’s use of form-based codes).
180 The new mandatory form-based code, Miami 21, “will provide a clear vision for the City that will be supported by specific guidelines and regulations so that future generations will reap the benefits of well-balanced neighborhoods and rich quality of life.” City of Miami Planning Dep’t, Miami 21 Home Page, http://www.miami21.org (last visited Aug. 15, 2008).
places, not the sprawling and automobile-dependant developments that began to plague the nation’s landscape in the mid-twentieth century. Cities and towns that implement form-based codes provide citizens the option of walking, bicycling, or using public transit as practical means of alternate transportation—further reducing Americans’ reliance on oil.

Whether a particular form-based code is adopted in either an optional or mandatory format is a decision to be made by the local citizens and their government. Where landowners in a given municipality can generally agree on a community vision during the planning process, a jurisdiction-wide mandatory form-based code should be adopted. The mandatory format has been commonly favored in areas targeted for growth, such as commercial centers and downtowns, as these places lend themselves well to more compact and dense development. Where it is not possible to entirely replace the existing conventional zoning ordinance with a form-based code, optional codes have produced successful results since they are typically favored by developers over conventional ordinances. If the optional format is adopted, key areas that are designed to become focal points of the community should be regulated exclusively by a mandatory form-based code. Combining the optional and mandatory formats will guarantee that the most important sections of the city will possess the benefits and character of traditional neighborhoods, while still affording the option between a form-based code and a conventional ordinance to the many landowners outside the commercial centers—an option that avoids feared legal and political conflicts, yet has been demonstrated to generate a high-degree of form-based development.