

The SmartCode

By Quindal C. Evans

New urbanistic zoning attempts to solve some of the commercial, industrial and residential space problems faced by cities of all sizes.

Understanding a Modern Zoning Trend

The SmartCode is a model zoning code based on the ideals of new urbanism. Champions claim that the SmartCode solves suburban sprawl, builds walkable neighborhoods, protects our agricultural land, and

revives downtowns. In an effort to take advantage of these claims, almost 40 cities across the United States have adopted mandatory or optional versions of the SmartCode. *See SmartCodes Adopted*, <http://maps.google.com/maps/ms?ie=UTF&msa=0&msid=118391098176215503421.0004462129034d7b59666>. Almost 50 more cities are considering adopting a version of the SmartCode. *See SmartCodes in Progress*, <http://maps.google.com/maps/ms?ie=UTF&msa=0&msid=118391098176215503421.00044622563aeea805152>. The SmartCode's ascendance provides an opportunity for lawyers who understand its legal framework and its differences from more conventional zoning.

A Primer on Zoning

Let's get some terms straight. Land-use management involves planning, zoning, and subdividing. *See Richmarr Holly Hills, Inc. v. Am. PCS, L.P.*, 701 A.2d 879, 898 (Md. Ct. Spec. App. 1997). Planning refers to "the development of a community, not only with respect to the uses of land and buildings,

but also with respect to streets, parks, civic beauty, industrial and commercial undertakings, [and] residential developments..." *Id.* (quoting 1 E. Yokley, *Zoning Law and Practice* §4 (4th ed. 1978)). Zoning focuses on "the legislative division of a community into areas in each of which only certain designated uses of land are permitted so that the community may develop in an orderly manner in accordance with a comprehensive plan." *Best v. Zoning Bd. of Adjustment of City of Pittsburgh*, 141 A.2d 606, 609 (Pa. 1958). In other words, zoning implements a plan. Subdividing also implements a plan, a plan to divide land into one or more parcels. *See, e.g., Mills v. Alta Vista Ranch, LLC*, 187 P.3d 627, 629 (Mont. 2008) (setting forth Montana's statutory definition of subdivision). States bestow on municipalities the authority to plan, zone, and subdivide. *See Standard Zoning Enabling Act* (1926); *see generally* Stuart Meck, *Model Planning and Zoning Enabling Legislation: A Short History*, 1 *Modernizing State Planning Statutes: The Growing Smart Working Papers* 1-17 (1996) (explaining the history of zoning enabling legislation). Planning, zoning, and subdividing are all exercises of police power. *See Meck, supra*, at 1 (noting that a state delegates its police power to cities when it enables them to plan and zone).



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The History of Use-Based Zoning

In creating zoning ordinances, towns have generally implemented what is called Euclidean zoning, or *use-based zoning*. See Michael Lewyn, *New Urbanist Zoning for Dummies*, 58 ALA. L. REV. 257, 263 (2006) (“After *Euclid*, single-use zoning (also known as ‘Euclidean zoning’ after the case which upheld that technique) became virtually universal.”). Use-based zoning focuses on the type of use that is allowed on the land. For example, in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 379–81 (1926), the village had six different use districts. The first district allowed single-family homes, the second district allowed single-family and two-family dwellings, and the third district allowed single-family dwellings, two-family dwellings, and apartment buildings. See *id.* (describing the various uses allowed in the first-, second-, and third-uses districts). Overlying these use districts, Euclid also had districts determined by building height and size. See *id.* 381–82.

It is a singular definition of a space—the notion that space, however tall or wide, must have only one use, whether commercial, residential, or industrial—that creates sprawl and dead space. Many commentators argue that use-based zoning leads to unwanted suburban sprawl. See, e.g., John M. Barry, Note, *Form-Based Codes*, 41 CONN. L. REV. 305, 307 (2008) (noting that sprawl is a result of single-use zoning). While encouraging sprawl, use-based zoning can contribute to an increase in empty urban space. For example, when revitalizing an empty warehouse building on the edge of a downtown, use-based zoning might prevent a developer from creating condos in the upper floors of the building and a market on the ground level of the building. Cf. Lewyn, *supra*, at 272 (“[L]andowners are generally not allowed to build apartments over shops or offices.”) Instead, use-based zoning might require the developer to turn the entire building into commercial space, and this commercial-only development eventually could lead to sprawl when the condos that the developer sought to build are ultimately built two miles down the street. Not having the ability to convert the warehouse to a use that is in demand creates an unnatural distance between the commercial and residential space in the town.

At the same time, use-based zoning has benefits that are particularly appealing to lawyers and to those who hire lawyers. Use-based zoning systems are almost universally familiar because they are quite widely employed. See Lewyn, *supra*, at 263. *Town of Rhine v. Bizzell*, 751 N.W.2d 780, 787 (Wis. 2008) (“[T]raditional ‘use districting remains the mainstay of most zoning ordinances’ and ‘this is expected to continue for the foreseeable future.’” (quoting S. Mark White, *Classifying & Defining Uses and Building Forms: Land-Use Coding for Zoning Regulations*, American Planning Association Zoning Practice, Sept. 2005, at 3). As a result, use-based zoning is easy to apply, which benefits developers in the planning process, and it is easy to administer, which benefits local governments. For example, in the above-mentioned warehouse scenario, a developer would know that the warehouse had limited uses and would not need to expend significant resources to determine how the warehouse could be developed. Similarly, a city attorney would review the developer’s plans for the warehouse and simply determine if the plans were for a permissible use.

New Urbanism vs. Use-Based Zoning

New urbanism is the intellectual movement behind the SmartCode. It sprang up in reaction to use-based zoning systems. See Lolita Buckner Innis, *Back to the Future: Is Form-Based Code an Efficacious Tool for Shaping Modern Civil Life?* 11 U. PA. J.D. & SOC. CHANGE 75, 75N77 (2007–2008). In many ways, new urbanism reacted to the perceived negative effects of use-based zoning—namely, to shrinking mixed-use developments and increasing seemingly endless sprawl. See Chad D. Emerson, *Making Main Street Legal Again: The SmartCode Solution to Sprawl*, 71 MO. L. REV. 637, 637–42 (2006) (describing the SmartCode in relation to use-based zoning). According to the Congress for New Urbanism, a group dedicated to spreading information about new urbanism, we have developed our cities and towns in a way that promotes “disinvestment in central cities, the spread of placeless sprawl, increasing separation by race and income, environmental deterioration, loss of agricultural lands and wilderness, and the erosion of society’s built

heritage.” See Charter of New Urbanism, <http://www.cnu.org/charter>. In essence, new urbanism attempts to encourage mixed-use, walkable, neighborhood-based developments. See *New Urbanist Zoning for Dummies*, *supra*, at 258–59. These developments create “diverse environments,” and have similarities to the cities that developed prior to the wide-spread use of cars, strip

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malls, and use-based zoning. See Andres Duany & Emily Talen, *Making the Good Easy: The SmartCode Alternative*, 29 FORDHAM URB. L.J. 1445, 1446–48 (2002).

The idea that cities should be urban and that rural areas should be protected from sprawling over-development is based on historical development patterns. After all, our oldest cities have compact, walkable, and mixed-use centers, and as we move farther from city-centers, the density of these cities dissipates. Yet, our ability to achieve these ideals is limited by the system through which we have predominantly regulated our country’s land use. See Emerson, *supra*, at 646. New urbanism has attempted to reregulate zoning so that modern developments imitate historic growth patterns. See Lewyn, *supra*, at 267–69.

The SmartCode in Theory

The SmartCode has two main components: rural-urban transects and form-based zoning. Emerson, *supra*, at 641.

Whereas use-based zoning distinguishes between commercial, retail, low-density residential, high-density residential, or industrial zones, the SmartCode distinguishes between transects. Duany & Talen, *supra*, at 1453. *Transect* is simply a term used to describe different development density classifications for land use—in other words, a transect is a zone. See, e.g., *id.* at 1453–54 (describing transects). The SmartCode uses six transects. Starting with the



most densely developed, the transects are (1) urban core, (2) urban center, (3) general urban, (4) suburban, (5) rural, and (6) natural. *Id.* at 1454. Through the use of rural-urban transects, the SmartCode accounts for the development of urban, rural, and suburban areas.

A town does not have to be urban, suburban, and rural for the SmartCode to work

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for it. For example, downtown Petaluma, California, has only three transects: urban-center zone, general-urban zone, and urban-core zone. *See* Petaluma, California, Central Petaluma Specific Plan SmartCode, at §2.10 (2003) (Petaluma SmartCode). An urban-center zone is a zone that “is the equivalent of a main street.” *See generally*, Montgomery, Ala., SmartCode, at Table 1 (2007) (defining urban-core zone). Petaluma’s downtown does not have a rural zone nor does it have a suburban zone. *See* Petaluma SmartCode, at §2.10 (2003). The SmartCode is flexible, and this flexibility allows a city to pick and choose the transects that suit it best.

The SmartCode uses form-based zoning to regulate the land uses within each transect. Emerson, *supra*, at 641. Form-based zoning stands in stark contrast to use-based zoning. True to its name, form-based zoning regulates the form that structures on the land can take, not the use to which the land is put. *See* Barry, *supra*, at 308. Form-based zoning regulates the mass and relationship of buildings, not, generally, whether those buildings are industrial, commercial, multi-family, or single family units. *Id.* Form-based zoning permits a wide variety of development uses as long as the form of the structures fits within the contours of the zoning regulations. *Id.*

To understand the difference between a use-based zoning code and a form-based zoning code, the redevelopment

of an empty warehouse in a semi-urban area again makes for a good example. If a developer were to redevelop an abandoned warehouse in a use-based system, the development could take many different physical shapes as long as the development was for an industrial purpose. In form-based systems, however, the town might not be concerned with whether the new development is commercial or residential, but the town might decide that, due to the semi-urban location of the space, the new development should be situated on the front of the lot and three to five stories tall.

The SmartCode has significant benefits for decaying urban centers. *See generally*, *Town of Rhine v. Bizzell*, 751 N.W.2d 780, 787 (Wis. 2008) (“Many urbanists believe that mixed use districts are the key to restoring vibrancy to American cities.” (citing Sonia Hirt, *The Devil is in the Definitions*, 73 JOURNAL OF THE AMERICAN PLANNING ASSOCIATION, at 436 (Autumn 2007))). Its approach to zoning gives a town flexibility. It seeks mixed-use developments and smaller and more cohesive neighborhoods than form-based zoning. *See* Duany & Talen, *supra*, at 1467. It encourages people to walk more by minimizing the need to drive. *See id.* at 1448. The SmartCode also legalizes a significant trend: traditionally in cities over time, people tended to develop their neighborhoods so that they could work, shop, and sleep all within a small, walkable space, while use-based zoning often prohibited people from developing places to work and shop near their homes. *See* Emerson, *supra*, at 637–38. In fact, many centuries-old urban centers would not have been legally built under modern use-based zoning codes. *See* Barry, *supra*, at 307. Finally, by controlling the form of developments within each transect, planners can adapt form-based zoning to manage the density of an urban core and protect the sparse settlements of the rural outskirts, and manage and protect everything in between. *See* Emerson, *supra*, at 644.

Despite these many advantages, form-based zoning can be difficult to administer, which is perhaps intrinsic to its flexibility. It is almost, if not entirely, impossible to separate the form of a development from an aesthetic determination. Even ultimately with judicial relief, it can be difficult to prevent government officials from

initially making unfair or biased decisions when it comes to determining certain discretionary form-based issues. *See* Elizabeth Garvin & Dawn Jourdan, *Through the Looking Glass: Analyzing the Potential Legal Challenges to Form-Based Codes*, 23 J. LAND USE & ENVIR. L. 395, 416–17 (2008) (noting that form-based zoning might place too much discretion in the hands of local officials). For example, an elected official, in an effort to help those who are already land owners in an area, and also likely, residents, might create set-back and building height requirements that are prohibitively expensive for developers who are not preexisting landowners. Even if a local government is not motivated to use form-based zoning to help local residents, taken too far, form-based zoning could result in nothing more than the creation of a legally sanctioned and required aesthetic. *See, e.g.*, Inniss, *supra*, (discussing how there is no community-wide zoning ideal).

Furthermore, due to its novelty, form-based zoning’s legal status is unclear. Form-based zoning combines historically separate functions: zoning and subdividing. *See* Emerson, *supra*, at 682 (discussing unification of subdivision regulations and zoning ordinance under the SmartCode). As a result, it does not fit neatly within many states’ enabling statutes. *See* Garvin & Jourdan, *supra*, at 410N11. There is also a dearth of case law on the SmartCode.

How to Adopt the SmartCode

Before deciding whether to adopt the SmartCode, a town or county should make sure that it has the authority to adopt a form-based zoning code. First, does the county or town have the authority to plan, zone, and subdivide, and (2) if so, do those powers cover form-based zoning? The answer to the former question can likely be found within a particular state’s zoning code. *See, e.g.*, Standard Zoning Enabling Act §§1 (1926) (setting forth grant of power); Standard City Planning Enabling Act §12 (1928) (setting out subdivision authority). For example, under the Standard City Planning Enabling Act, a municipality has the authority to plan, zone, and subdivide. *Id.* §§6, 11–12. If a county or municipality has the authority to plan, zone, and subdivide, it must next determine whether it has the authority to adopt form-based zoning. While this is not

likely an issue in most jurisdictions, given the novelty of form-based zoning, there is insufficient legal authority to assume that this authority exists. See Garvin & Jourdan, at 410–11 (discussing whether form-based zoning is authorized and concluding that this is likely a non-issue).

If a town or county has the authority necessary to adopt the SmartCode, it should first create a land-use plan under its planning authority. In fact, this step is not only helpful, but it is often required. Most states require a town or county to make a comprehensive plan before they can enact zoning regulations. See, e.g., Standard City Planning Enabling Act §11 (1926) (requiring that a plan be made before zoning); see, generally Ed Bolen *et al.*, *Smart Growth: A Review of Programs State by State*, 8 *Hastings W.-N.W. J. ENVTL. L. & POL'Y* 145 (2002) (setting forth each state's zoning and planning process). In a few states, local land-use plans must conform to statewide land-use plans. See FLA. ST. ANN. §163.3161(6) (setting forth requirements for local land use plans).

When creating a plan, a local government should involve the residents as much as practicable, through a series of public meetings, which in the SmartCode “process” are called *charrettes*, prior to drafting a plan. See, e.g., Patricia E. Salkin, *Squaring the Circle on Sprawl: What More Can We Do? Progress Toward Sustainable Land Use in the States*, 16 *WIDENER L.J.* 787, 809 n. 109 (2007) (explaining the charrette process). Involving the public also helps educate residents about the new zoning plans and can help to set their minds’ at ease. Cf. *Steele v. City of Port Wentworth, Geor-*

gia, No. CV405-135, 2008 WL 717813 (S.D. Ga. Mar. 17, 2008) (describing the actions taken by the city when adopting a new plan and zoning code based on New Urbanist principles and how those actions were perceived by the community). In this respect, encouraging early public involvement in planning can help avoid future costly litigation challenging the legality of new zoning ordinances. See *id.* (discussing the factual and procedural history of the town’s adoption of a new urbanist zoning code).

Once a plan is in place, a town or county should begin to draft its SmartCode. While it is possible to hire a designer or professional planner during the drafting stage, it is not necessary. Downloads of the SmartCode are available “free of charge to municipalities and design firms who wish to work with the code.” SmartCode Files, Smart Code Central, http://www.smartcodecentral.com/smartfilesv9_2.html, ¶1. Towns can purchase 20 copies of the SmartCode, along with an introduction for \$120. *Id.* If a town needs more resources, in addition to those available on the Internet, a manual with notes, legal advice, and other information can be purchased for \$ 99. See *New Urban News*, <http://www.newurbannews.com/> (follow “SmartCode Version 9 and Manual” hyperlink).

There are numerous technical requirements for adopting zoning changes. Many of these requirements vary from state to state, and prior to adoption of the SmartCode, an attorney should check state and local laws to make sure that a town complies with the necessary procedural steps. Local requirements will include adhering to all applicable notice laws. Making sure

that the zoning ordinance adoption process conforms to all local and state laws can also serve as an additional opportunity to educate and work with the community because some of these requirements, such as notice requirements, will inform residents of changes to zoning laws.

Finally, though many local governments need not conform to state or regional plans when drafting zoning ordinances, when adopting the SmartCode, cities might want to reach out to neighboring towns. For example, both Pike Road and Montgomery are located in Montgomery County, Alabama. While both towns are authorized to create zoning regulations, the county is not. Because both of these towns’ adopted the SmartCode, Montgomery County, Alabama, has a somewhat unified system of zoning. While small rural towns and their larger neighbors often differ on very important, revenue-related issues, they must also recognize that neither can exist in a vacuum. Each is dependent on the other, and the citizens of both communities must learn how to grow and prosper together.

Conclusion

While we cannot foresee every potential problem of commercial, industrial, and residential space, the SmartCode at least attempts to solve some of the problems faced by cities of all sizes. The future of the SmartCode, as with the future of many laws, depends on its practical implementation by elected officials, lawyers, and judges, and if it proves effective in reaching its goals, its ultimate utility will be seen when citizens can create vibrant, diverse, and self-sustaining communities. 