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

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Abstract

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

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

I. Introduction

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

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

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² See, e.g., Lewis Mumford, The City in History: Its Origins, Its Transformations, and Its Prospects 2-10 (1968 Harvest Books) (1961). In his book Mumford seeks to return to the beginnings of the city and calls for an “organic” city in which technological innovation should not take precedence over the essential humanness of civilization: “... We need a new image of order, which shall include the organic and personal , and eventually embrace all the offices and functions of man.” Id. at 4
place as a result of the implementation of Euclidean zoning schemes. In the case of newer towns, those founded purely on Euclidean principles of separation of use, New Urbanists assert that the vital mix was never there in the first place and that thus such places exist as soulless shells.3 The New Urbanist remedy for this municipal malaise is to put into place the elements deemed crucial for maintaining a thriving civic life.4 One recently developed mechanism for achieving the goals of New Urbanism is form-based code.5

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

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


5 Id.

6 Id.

7 Some cities and towns that have recently adopted some aspects of form-based code as part of the zoning process include Syracuse, New York; Palo Alto, California; Arlington, Virginia; Petaluma, California; Huntersville, North Carolina; Louisville, Kentucky; and Emmaus, Pennsylvania. Many more are either considering adopting form-based codes or in the process of drafting such codes. See e.g. Jason Miller, Smart Codes, Smart Places National Association of Realtors Magazine Summer 2004, Available at http://www.realtor.org/SG3.nsf/pages/summer04sm?OpenDocument.
connected to government.⁸ Instead, the cities of old often spontaneously developed, with the buildings, streets, and neighborhoods themselves forming a type of “law.”⁹ Because creating the amenities necessary to implementing New Urbanism often requires substantial changes to infrastructure, form-based code is more frequently utilized in the design of new towns and undeveloped sections of towns and cities, or in efforts to infill or retrofit land in existing urban areas. Form-based code, however, unlike the Euclidean zoning¹⁰ codes that are at the base of most zoning and planning schemes in United States cities and towns,¹¹ focuses not on land use but on the character of development. Instead of attempting to segregate uses across

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

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

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

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

¹² Charrette (sometimes spelled “charette”) is an architectural term that refers to a collective
workshop process undertaken by designers and planners to reach consensus on the design of a
particular project and to sketch out the project’s preliminary form. See Nat’l Charrette Inst.,
What Is a Charrette?, http://www.charretteinstitute.org/charrette.html (last visited November 13,
2006). The charrette has been increasingly used to encourage participation in urban
development schemes and has been, states on commentator, a very deliberate part of the federal
governments decentralization scheme in federally-sponsored urban development. Audrey G.
McFarlane, When Inclusion Leads to Exclusion: The Uncharted Terrain of Community
Participation in Economic Development, 66 Brooklyn L. Rev. 861, 863 (2000). In the context of
form-based code, the charrette usually involves lay members of a community interested in or
affected by a project as well as design and planning professionals. Benjamin E. Northrup &
Benjamin J. Bruxvoort Lipscomb, Country and City: The Common Vision of Agrarians and New
Urbanists, in The Essential Agrarian Reader: The Future of Culture, Community, and the Land
191, 198-199 (Norman Wirzba ed., 2004). It is said to have been conceived in the development
of Seaside, Florida, one of the first acknowledged New Urban communities. Id. For a general
discussion of the charrette in form-based code processes see Charles J. Kibert, Construction
Ecology 238-239 (2002); Kenneth Hall & Gerald Porterfield, Community by Design: New
Urbanism for Suburbs and Small Communities 51 (2000). See also Thomas L. Daniels, Holding
This Essay serves as a critique of the New Urbanism in general and of form-based code in particular as a tool of the New Urbanism. It may be true that form-based code offers more flexibility than traditional zoning schemes and thus may offer some respite from acknowledged ills such as social and racial divisions created by exclusionary zoning and other tools, and from the relative inutility of single or limited use districts. However, I will argue that these benefits are eclipsed by some of the problems of form based code. Form-based code is frequently hailed as a “back to the future” approach to both urban and suburban living which will cure numerous ills such as the physical decay, racial segregation, and economic downturns that are endemic to many United States cities and towns, but it may not be an effective means of addressing the decline of civic life. I identify three reasons for this.

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

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

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

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

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

A. The Economic Impetus of City Formation

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

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16 Id.

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

B. Private Land Use Agreements as Planning Devices

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

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¹⁸ Id.
¹⁹ Id.
²¹ Id.
²² Id.
²³ Id.
²⁴ Id.
Anglo-American jurisprudence: express private agreements and nuisance law to police land use. Private land use agreements typically contained prescriptions on actions related to land or placed affirmative duties upon the parties in relation to their control or ownership of land, and were usually seen in the form of easements or covenants which could be invoked in the event of a breach. Nuisance law generally allowed persons to address harmful actions by neighbors or others which were not covered by pre-existing agreements. These traditional land use control mechanisms had significant limits, however, which became all too obvious in the dawn of the twentieth century.

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

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28 Bayles, supra note 25, at 235-236.
doctrine. This was of particular concern to the traditional landed classes since, in the period near the turn of the nineteenth century, many social codes that often kept the urban poor and working classes well away from the rich were broken. This meant that some wealthy landowners were confronted with behaviors by nearby landowners that, while possibly annoying or even offensive to certain personal or community norms, were not actionable.

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

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

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

30 Dukeminier supra note 27, at 952.
relative few, and social exclusivity, gave way, if not factually then ideologically, to broad notions of equality not only in social relations but in legal relations.\textsuperscript{31} This was especially true as it concerned land ownership and use. The firmly fixed but invisible geographic boundaries and land use norms that had for generations divided rich from poor and immigrant strivers from old money aristocrats and wealthy merchants were quickly dissolving in the stew of modern urban life. These limits to traditional law, combined with the widespread socioeconomic transformation seen at the beginning of the twentieth century meant that a new mechanism was required to control land use. This new mechanism was zoning. New York is generally said to have had the first city-wide zoning code, adopted in 1916.\textsuperscript{32} A number of cities soon followed suit, and much of the zoning enabling legislation originally adopted prior to 1924 was based on the New York general city enabling act.\textsuperscript{33}

\textbf{C. The Rise of Zoning Codes}

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

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


\textsuperscript{33} \textit{Id.} at 27.

\textsuperscript{34} See \textit{e.g.} Stephanie B. Kelly, Community Planning: How To Solve Urban Environmental Problems 68 (2004); \textit{see also} Paul Wheeler, An Architectural Perspective on the Future of the
innovation, technological advances, and notions of limitless abundance.\textsuperscript{35} It was also characterized by previously unseen levels of pollution and other environmental degradation.\textsuperscript{36} This was, moreover, a time of seismic socioeconomic change, vastly altered mores, and an associated anomie, all of which caused the period to be described by various commentators as both the beginning of and the beginning of the end of the “American” way of life.\textsuperscript{37} This vast schism in the perceptions of early twentieth century life grew largely from the growth in social mobility that accompanied the changes of this period.\textsuperscript{38} While social mobility was arguably one of the hallmarks of life in the United States because it resulted in a broadening of the middle class and the rise of a new wealthy class, social mobility was at the same time the bane of many members of the long established landed upper classes. Explicit, legislated urban planning was a means of mediating the burgeoning class conflict in American cities.\textsuperscript{39} Because some of the world’s older cities had already begun to confront this challenge, many looked to Europe for answers and especially to the land use mechanism being developed in parts of England which came to be known as the Garden Cities movement.

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

\textsuperscript{36} Kelly, supra at note 34.


\textsuperscript{38} Id.

\textsuperscript{39} Id.
The Garden Cities movement, developed by English social reformer Ebenezer Howard, is said to have served as the ideological roots of planning and ultimately of zoning.\textsuperscript{40} Howard developed his proposals to improve the lives of London inhabitants, advocating for a resettling of some of London’s inhabitants into small, new towns in the countryside where they could avoid the harsh, crowded conditions of the large city. These new cities were characterized by an effusion of single family houses, surrounded by gardens. Howard’s idea had several unique aspects. First, it called for a strict segregation of uses and a permanent belt of open land which would limit the growth of the new city.\textsuperscript{41} It dispensed with private ownership and called for municipal ownership of the entire tract, which would then be distributed via leaseholds to inhabitants.\textsuperscript{42} It further called for limits on population, the development of industries able to support the population, and made provision for the founding of new communities as original garden cities became fully inhabited.\textsuperscript{43}

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

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

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

\textsuperscript{42} Id. at 35

\textsuperscript{43} Id.

\textsuperscript{44} Peterson, supra note 14, at 232.
revitalization, and ultimately social progress, could be achieved by beautification and sanitation regimes with attention to landscape design, municipal improvement and civic configuration, also captured some of Howard’s ideas.\(^{45}\) The most noteworthy of Howard’s ideas to be embraced by American civic planners, which was also in many ways the culmination of the City Beautiful movement, was the adoption of segregated uses and the preference for single family homes.\(^{46}\) Inspired by Howard’s ideas, and in response to concerns with building uniformity, public health, safety and welfare, starting in the late 1800s in the United States, cities and towns began to develop zoning codes.\(^{47}\) Zoning has been hailed as the single most important innovation promoted by American planners in the years prior to World War I.\(^{48}\) In 1926, the legality of zoning was established in *Village of Euclid v. Ambler Realty.*\(^{49}\)

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


\(^{46}\) Peterson *supra* note 14, at 308.

\(^{47}\) *Id.* at 308-309.

\(^{48}\) *Id.* at 308

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

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

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

\textsuperscript{51} Id.

\textsuperscript{52} Id. at 384-385.

\textsuperscript{53} Id. at 385.

\textsuperscript{54} Id.

\textsuperscript{55} Id.

\textsuperscript{56} Euclid at 388 citing Welch v. Swasey, 214 U.S. 91 (1909); Hadachek v. Los Angeles, 239 U.S. 394 (1915); Reinman v. Little Rock, 237 U.S. 171 (1915); Cusack v. City of Chicago 242 U.S. 525, 529-530 (1917). Before Euclid, cases had supported the municipal use of the police power to prohibit uses which could cause nuisances.
relationship to the public health, safety, morals, or general welfare. *Euclid* settled the constitutionality of comprehensive zoning. Since *Euclid*, zoning ordinances bear the presumption of validity. When they are subject to challenge, it is only under the rational basis standard. In the aftermath of *Euclid*, legislated land use via zoning quickly became the norm in United States towns and cities.

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

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

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

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


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

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

\textsuperscript{62} 245 U.S. 60 (1917).

\textsuperscript{63} \textit{Id.} at 82.

\textsuperscript{64} Silver, \textit{supra} at 32.
which have the effect of increasing the cost of housing so that it is beyond the means of lower-income households.\textsuperscript{65}

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

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

\textsuperscript{66} See M. Christine Boyer, Dreaming the Rational City: The Myth of American City Planning 237 (1986). The “rust belt” phenomenon, the deindustrialization, decay and depopulation of older United States cities has been produced by a number of factors, among them the loss of manufacturing jobs and their partial replacement by knowledge-intensive white collar jobs often requiring post-secondary education. John D. Kasarda, Cities as Places Where People Live and Work: Urban Change and Neighborhood Distress, in Interwoven Destinies: Cities and the Nation 81, 83 (Henry Cisneros ed., 1993). This has meant that already present poorly educated inner city residents were excluded from employment. Id. The decline of these Northeastern and Midwestern cities has, however, to a great extent been paralleled by the almost exponential growth of “sun belt” cities in the South and Southwest. Eli Ginzberg, The Changing Urban Scene: 1960-1990 and Beyond, in Interwoven Destinies: Cities and the Nation 31, 35-37 (Henry Cisneros ed., 1993).
clerical, retail or nonunionized manufacturing or altogether unemployed.\textsuperscript{67} In many of America’s oldest cities, thriving middle-class communities of the early and mid-twentieth century have given way to an ever-burgeoning group of have-nots. In an effort to diagnose and treat the malady of the declining American urban area, New Urbanist planners have increasingly turned to the pre-zoning city of the past as a model. Form-based code is one mechanism for this look backward.

\textbf{D. Form-based Code as New Urbanist Tool}

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

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

\textsuperscript{68} John Friedmann, The Prospect of Cities 101 (2002).

\textsuperscript{69} See \textit{e.g.} John Friedmann, Planning in the Public Domain: From Knowledge to Action 412 (1987).

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

\textsuperscript{71} Friedmann, The Prospect of Cities \textit{supra} note 68, at 101.
\end{footnotesize}
to include a broad cross-section of the populace at the ground level.\textsuperscript{72} These ideas have been propagated by a number of planning experts.\textsuperscript{73} Though form-based code is seen in various iterations in United States municipalities, it is typified by the presence of most or all of the following fixed characteristics: a controlling regulating plan, a framework of urban regulations, regulations defining streets and related passageways, landscape regulations, and finally architectural regulations.\textsuperscript{74} Perhaps the most defining features of form-based code are its design-based rather than use-based standard for development and its reliance on the community in conjunction with city officials and planning professionals to articulate the nature of the design.\textsuperscript{75} This means that the characteristics which define a form-based code regime are often presented as “empty boxes” to be filled at the discretion of the multiple actors involved in reaching consensus. Form-based code, with its attention to detail on the most local level, appears to be the ultimate tool of the New Urbanism movement. New Urbanism, however, is a movement which is itself subject to critique because of its uncertain foundations and unsubstantiated claims.

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

\textsuperscript{72} Id.

\textsuperscript{73} See e.g. Sandercock, supra note 70.


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

\textsuperscript{76} Emily Talen, New Urbanism and American Planning: The Conflict of Cultures 4-5 (2005).
represents an effort to create a fuller and more nuanced framework for urban living. This has often meant calls for a return to the United States cities and towns of the pre-zoning nineteenth century, where, for example, much of the population lived in or around a defined center in densely built enclaves. Walking was one of the principal means of transportation, and most jobs were within city limits. These burgs, we are given to understand, were exemplary in both form and function. New Urbanism mediates for a return to this traditional way of living by implementing zoning and planning norms that will create or recreate such communities. Though sometimes known by other names such as Neotraditional Planning, Traditional Neighborhood Development, Transit-based Development, and even New Suburbanism, in every incarnation New Urbanism extols the virtues of the cities and towns of former times. There are numerous critiques of Urbanism which have been launched in the years since the inception of the movement. Three of these critiques are particularly salient. First, it is not clear that there is a single type of traditional Urbanism. Next, traditional urban form was for the most part serendipitous, arising more in response to the economic needs, geographic positioning and demographic characteristics of the particular urban locale. Finally, it is not clear that the New Urbanist vision adequately addresses the way that people want to live now.

1. Multiple Strands of Urbanism

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

\[\text{Id.}\]


\[\text{See Talen infra note 76.}\]
definition. Most would agree that the broad concept of Urbanism described life in the city environment as opposed to suburban or rural life. But there the consensus ends. It has been argued that Urbanism, rather than being descriptive of one movement, is really an amalgam of multiple and sometimes competing “cultures.” One of these cultures calls for attention to the built environment on a micro scale, focusing, for example, on particular recreational spaces or educational facilities. Another form of Urbanism looked to macro-developmental approaches for the creation and maintenance of the urban environment, with attention to broad land use norms or on large-scale local and regional transit systems. Some views on Urbanism have actually been exurban in view, looking to the areas beyond the city as the ultimate in desirable human habitats. Finally, some types of Urbanism have been more ecologically focused, and have looked to ways to reconcile the built environment with the natural environment.

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

80 Talen, supra note 76, at 1.

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

82 Id.

83 Id.

84 Id.

85 Id.
All three envisioned urban utopias that would constitute radical reconstructions of the city so as to eliminate features that they believed to be baneful, such as high density and mixed uses. Yet, these very features are now extolled as virtues of the “traditional” urban environment and the goal of most New Urbanist planning.

2. Accidental Urbanism

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

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88 Id.
3. New Urbanism and the Way We Want to Live

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

To summarize, urban land use planning in the United States began as a mostly private
system of land use regulation which, after the turn of the nineteenth century, ultimately evolved
\footnotesize{\textsuperscript{89} Peter Calthorpe & William Fulton, The Regional City: New Urbanism & the End of Sprawl
130 (2001).}

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

\footnotesize{\textsuperscript{91} James Howard Kunstler, Home From Nowhere: Remaking Our Everyday World for the 21st
Century 194 (1996).}

\footnotesize{\textsuperscript{92} Harvey, supra note 90, at 105.}
into widespread zoning schemes that all but replaced private land use schemes as a means of planning. Form-based code, a principal tool of New Urbanism, represents the next step in the evolution of land use planning; like zoning, this tool comes at time of massive social and economic change in the American urban environments. In such a context, the word community becomes even more a contested notion. For this reason, one of the most noteworthy features of the form based code, the community consultative process via the charrette, becomes a subject for significant critique.

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

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

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

94 Id. at 115

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

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

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

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

97 Sandercock, supra note 70.
control such processes. Because form-based code focuses on localized developments and the character of those developments, it potentially allows empowered elites not only to retain control of the planning process but to custom tailor their own neighborhoods without concern for the needs of the broader municipality. In the absence of a strong central municipal government to manage community design with an eye towards broad societal concerns such as environmental impact, the charrette could become a means of further disempowering the already disenfranchised. 98

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

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

99 Freestone at 2.
In the area of planning, there has long been insufficient attention to and a deep ambivalence about what is in many cases a clear cut differential in power or access to power.\textsuperscript{100} Hence, what is needed is a focus on what has been described as the “dark side” of traditional land use planning.\textsuperscript{101} This would mean, for example, considering “demand side” planning concerns, acknowledging and even engaging the disorder of actual planning and design outcomes, and the lived experiences of participants in such processes. There is, in contrast to the utopian, apolitical and idealized history of zoning and planning, a “noir” history, one which addresses the very real fact that planning has been, and continues to be in a number of cases, a tool of social oppression.\textsuperscript{102} This is frequently true because planning projects are driven by elites.

\textit{B. Fears of “Responsibilization” and the Establishment of “Government at a Distance”}

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

\textsuperscript{101}Yiftachel \textit{supra} at 396.

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

Most accounts of planning neglect to explain its frequent application for purposes of (deliberate) social control, as expressed in the oppression of peripheral groups. This is not to claim, of course, that planning is inherently regressive, but rather that its well-documented progressive potential should also be understood as having a more sinister accompanying 'dark side'. This dark side is particularly evident when planning is used by 'ethnic states' as part of their territorial policies, but is also rife in western societies governed by formal democratic principles of governance. \textit{Id.} at 395
Control by elites remains a problem in the case of a relatively new planning or regulatory tool such as form-based code. This is true because form-based code relies upon what has been called “responsibilitization”—the politically inspired imposition of autonomy upon those who had previously lacked such autonomy. Responsibilitization is seen in a number of areas, such as criminal enforcement via third party policing. It is part of a broader societal move away from Keynesian welfarism, which was exemplified by provision of services, and towards neo-liberal governance. The key feature of neo-liberal governance is the way in which individuals are incorporated into the process of managing their own lives as an enterprise via rational

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

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

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

106 Id. at 23
decision making.\textsuperscript{107} Neo-liberalism engages in the “valorization of the self-actualized subject.”\textsuperscript{108} This goal is typically achieved by two dominant modes of neoliberal practice: "government at a distance" wherein there is top-down reform of state apparatuses based on a market model.\textsuperscript{109} This reform generally takes the form of deregulation and privatization.\textsuperscript{110} The second takes a bottom-down approach which centers on building the "social capital" of the individual.\textsuperscript{111}

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


\textsuperscript{109} Eudaily, supra note 108, at 52.

\textsuperscript{110} Id., citing Bradford at 204.

\textsuperscript{111} Id. citing Dean at 152.

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

\textsuperscript{113} Eudaily, supra note 108, at 53.
neo-liberal government can achieve its objectives all while reducing its commitment to formal governance and resource provision.\textsuperscript{114} Form-based code closely resembles this social capital model and thus may be located in the arsenal of neo-liberal weaponry for revising government.

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

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

\textsuperscript{114} Id.

\textsuperscript{115} Peter Brand & Michael J. Thomas, Urban Environmentalism 94 (2005).

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

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

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

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

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

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

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

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

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

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


\textsuperscript{123} Id.

\textsuperscript{124} Id.
their own parochial concerns based on commonalities like race, class, and economic status.\textsuperscript{125} Indeed, it has been observed that community consultations in the context of civic planning are rarely able to capture the views of the most disempowered groups.\textsuperscript{126} This last point is one of particular concern in New Orleans. New Orleans was a hotbed of race and class divisions before the hurricane and certainly remains so afterward. Moreover, New Orleans city planning processes, like those in many United States Southern cities, had long been dominated by elites; this was due in part to those cities’ antebellum social structures.\textsuperscript{127} It has been asserted that one of the principal reasons that post-Hurricane New Orleans opted for the community guided plan was that efforts to develop a comprehensive city-wide plan were challenged for failing to take into account racial and economic diversity.\textsuperscript{128} By delegating the responsibility for planning to the resident-led design teams, the city was able to abdicate the broader responsibility that it would have had under a traditional Euclidean scheme.

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

\textsuperscript{125} Ourousoff supra.

\textsuperscript{126} John Friedmann, The Prospect of Cities, \textit{supra} note 68, at 101.


\textsuperscript{128} Ourasoff supra.

\textsuperscript{129} New Orleans is divided into seventeen wards. The Ninth Ward, located in the easternmost downriver portion of the city, is the largest of these wards and is arguably the most famous ward.
Many of the residents are little equipped to undertake the necessary measures to plan for the rebuilding of their neighborhoods. Already it has been observed that residents in affluent neighborhoods have been the best organized and thus best able to take advantage of the form-based process. This suggests that the neighborhoods that suffered disproportionately in Hurricane Katrina because of location and infrastructure disadvantages may risk having those same disadvantages carried over in the form-based code process. Yet, because such processes are to a great extent self-regulated, there is no central authority to whom they can turn for relief.

IV. Conclusion

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

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

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131 Ourosoff at B1

132 Jacobs, Great American Cities, supra note ___ at 1.
civic, and commercial centers to serve the new populations. Such explicit civic planning, wrote Jacobs, often failed. This was because it failed to take into account that there was order underlying even the seeming unplanned disorder of successful cities, order that resulted from “an intricate and close grained diversity of uses.” Form based is a New Urbanist tool whose goal is to reinstate form and utility based cityscapes of the pre-zoning period of American cities.

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

133 Id.

134 Id.

135 Jacobs, Great American Cities, at 14.

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

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


139 Id. at 2
and maintenance of privilege are accomplished myriad means. What New Urbanists fail to acknowledge is that form-based code, all while promoting an ethic of neighborhood self-government, may itself be co-opted as a tool for perpetuating disadvantage.