

Brooklyn Law Review

Volume 78

Issue 2

SYMPOSIUM

Post Zoning: Alternative Forms of Public Land Use
Controls

Article 24

2013

Redeeming Transect Zoning?

Nicole Stelle Garnett

Follow this and additional works at: <http://brooklynworks.brooklaw.edu/blr>

Recommended Citation

Nicole S. Garnett, *Redeeming Transect Zoning?*, 78 Brook. L. Rev. (2013).

Available at: <http://brooklynworks.brooklaw.edu/blr/vol78/iss2/24>

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized administrator of BrooklynWorks. For more information, please contact matilda.garrido@brooklaw.edu.

Redeeming Transect Zoning?

Nicole Stelle Garnett[†]

INTRODUCTION

Thanks to the growing influence of the new urbanists—a group of architects and urban-planning professionals who promote the development of mixed-land-use neighborhoods¹—“transect zoning” is becoming the zoning reform *du jour*. Over the last few decades, the new urbanists have mounted a remarkably successful public-relations campaign against traditional zoning practices and the suburban land use patterns that they mandate. The new urbanists’ case against zoning is part antisuburban polemic and part pro-urban philosophy.² At heart, the new urbanists’ claim is that cities are good for us—and suburbs are bad. Or, to put the claim into social-science terminology, the new urbanists argue that cities generate social capital by drawing together strangers who would not otherwise connect, while suburbs inhibit social capital by further privatizing our already-atomized culture.³ Thus, it follows that zoning laws that mandate a single-land-use, “suburban” built environment ought to be scrapped. These claims build, in important ways, upon Jane Jacobs’s enormously influential book, *The Death and Life of Great*

[†] Professor of Law, Notre Dame Law School.

¹ See CONGRESS FOR THE NEW URBANISM, CHARTER OF THE NEW URBANISM (2001), available at http://www.cnu.org/sites/files/charter_english.pdf (stating the principles of the new urbanism); *What is CNU?*, CONGRESS FOR THE NEW URBANISM, http://www.cnu.org/who_we_are (last visited Aug. 30, 2011) (stating the principles of the new urbanism); see also GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 149-54 (1999) (describing the principles of the new urbanism).

² See e.g., LÉON KRIER, THE ARCHITECTURE OF COMMUNITY 104 (2009) (“Functional zoning replaces the organic order of the city with the mechanical disorder of the suburbs . . .”).

³ By social capital, I refer here to Robert Putnam’s “lean and mean” definition: “Social networks and the norms of reciprocity . . . that arise from them.” ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 19 (2000). Specifically, the new urbanists claim, to borrow from Putnam, that nonresidential land uses are “bridging” institutions—that is, they draw together groups of individuals who might not otherwise interact. *Id.* at 22-24. For a thoughtful discussion of the new urbanism and social capital, see Sheila R. Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527, 559-61 (2006).

American Cities. Jacobs wrote at the apex of the urban-renewal period—a time when urban-planning ideology and practices strongly favored imposing single-land-use patterns on our cities, even to the point of demolishing mixed-land-use communities in order to replace and modernize them. She vehemently rejected the conventional wisdom that dense, mixed-land-use urban neighborhoods were hopelessly antiquated and unhealthy. On the contrary, she argued that mixed-land-use urban neighborhoods are critical to city life because commercial land uses both generate social capital and guarantee a steady supply of “eyes upon the street” to monitor and keep disorder and crime in check.⁴

While new urbanists echo Jacobs’s embrace of urban land use patterns, their preferred method for achieving them departs from her relatively libertarian belief that cities thrive best when governments leave them alone.⁵ Neither new urbanism nor the new urbanists’ regulatory alternative to zoning is a libertarian project. New urbanists argue that cities should reject *use-based* zoning regulations in favor of a system of *form-based* aesthetic controls that governs the appropriate form of buildings in a given neighborhood.⁶ Their regulatory alternative to zoning finds its roots in architect Andrés Duany’s 2003 *SmartCode*, which flows from the assumption that urban development proceeds naturally from more-dense areas to less-dense ones.⁷ Duany calls this progression the “transect” and urges cities to replace traditional use zoning with regulations on building form appropriate to the various “transect zones” along the progression.⁸ The extent of the new urbanists’ influence is increasingly reflected by their success in convincing regulators to adopt “transect zoning” laws and the

⁴ See generally JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961).

⁵ See ANDRÉS DUANY ET AL., *SMARTCODE: VERSION 9.2*, at iv (2012), available at <http://www.transect.org/codes.html> (last visited Sept. 26, 2012) (“[The SmartCode] is meant to be law . . . administered by municipal planning departments and interpreted by elected representatives of local government.”); *What Are Form-Based Codes?*, FORM-BASED CODES INST., <http://www.formbasedcodes.org/what-are-form-based-codes> (last visited May 30, 2012) (“[F]orm-based codes are regulatory, not advisory.”).

⁶ See DANIEL G. PAROLEK ET AL., *FORM-BASED CODES* 4, 12 (2008) (describing form-based codes as a method to regulate new-urbanist-style development by controlling physical form rather than land use).

⁷ DUANY ET AL., *supra* note 5, at vi-vii.

⁸ *Id.* at xi; Andrés Duany & Emily Talen, *Transect Planning*, 68 J. AM. PLAN. ASS’N 245, 245-48 (2002).

“form-based” codes that accompany and supplement them.⁹ Indeed, the available evidence suggests that increasing numbers of local governments are implementing these concepts as alternatives or supplements to traditional zoning practices.¹⁰ The reach of these regulations, however, varies by jurisdiction. While a small but growing number of local governments have chosen to implement them comprehensively, on a city-wide basis, many of these reforms are limited in application to individual neighborhoods or urban redevelopment projects.¹¹

Theoretically, transect zoning embraces a relatively simple concept about how to regulate urban development: buildings that are appropriate for the city center should go in the city center (regardless of their use), and suburban buildings should look suburban (again, regardless of their use). For example, it would be appropriate—according to this view—for a dentist office to locate in a repurposed suburban home.¹² In its implementation, however, transect zoning is anything but simple. As a practical matter, new urbanists favor replacing traditional zoning with very meticulous and exhaustive aesthetic regulations, found in the form-based codes that represent the ubiquitous gap-fillers in transect-zoning regimes. To varying degrees, these codes dictate the architectural details (that is, the *form*) of buildings appropriate for the

⁹ See Doris Goldstein, *New Urbanism: Recreating Florida by Rewriting the Rules*, 80 FLA. B.J. 63, 64-65 (2006); Philip Langdon, *Form Based Codes Reach Critical Mass*, BETTER! CITIES & TOWNS, Apr. 1, 2010, at 1-4, available at <http://bettercities.net/article/form-based-codes-reach-critical-mass>.

¹⁰ As of September 2010, there were 332 form-based codes that meet Form-Based Code Institute criteria. See Placemakers, *SmartCode Complete: Code Study*, <http://www.smartcodecomplete.com/learn/links.html> (last visited Sept. 15, 2012). The cities of Miami and Denver have completely overhauled their existing zoning codes in favor of transect-zoning regulations. See Dakota Handon & Alex Adams, *Miami 21: A Blueprint for Miami's Future*, FLA. PLAN. 1, 4 (Winter 2010), available at http://www.fltod.com/research/tod_planning_and_fbc_in_florida/miami_21/miami_21_florida_planning.pdf; CITY OF MIAMI PLANNING DEP'T, MIAMI21: YOUR CITY, YOUR PLAN, www.miami21.org (last visited Aug. 27, 2012) [hereinafter MIAMI21]; Sarah Neumann, *The New Denver Zoning Code and What It Means for Downtown*, URB. EYE BLOG (Mar. 9, 2010), <http://www.livedowntowndenver.com/LDDBlog/?p=1752>; Christopher N. Osher, *Denver Council Passes Overhaul of City Zoning Laws*, DENVER POST (June 22, 2010, 1:00 AM), http://www.denverpost.com/news/ci_15346942.

¹¹ See *supra* Handon & Adams, note 10, at 1 (noting that governments often make form-based zoning mandatory for central business districts while offering it as an optional overlay elsewhere); see also Nate Berg, *Brave New Codes*, ARCHITECT MAG., July 1, 2010, at 51, available at <http://www.architectmagazine.com/codes-and-standards/brave-new-codes.aspx>.

¹² See, e.g., Chad D. Emerson, *Making Main Street Legal Again: The SmartCode Solution to Sprawl*, 71 MO. L. REV. 637, 638-45 (2006); Peter Katz, *Form First: The New Urbanist Alternative to Conventional Zoning*, PLANNING 16, 18-20 (2004) (describing merits of form-based coding).

various zones in the urban transect. These details can consume dozens, even hundreds, of pages of regulations.¹³

In the interest of full disclosure, I am a zoning skeptic. I also share the new urbanists' aesthetic; that is, I prefer traditional urban architecture, and I am not fond of suburban sprawl. In certain contexts, the mandatory imposition of this aesthetic is, in my view, entirely appropriate. For example, over the past several years, the University of Notre Dame, where I teach, has actively engaged in redeveloping the neighborhood adjacent to campus. The university's efforts include the construction of a new, mixed-use, "college-town" development as well as new housing for faculty and staff.¹⁴ I am glad that the university—as a property owner—has imposed design guidelines requiring traditional designs, which ensure that new buildings will blend into the older neighborhoods where they are located.¹⁵ But, when form-based codes are imposed on a broader scale as a *public* regulatory device—that is, when they are imposed beyond the private-development context—they raise a number of related concerns that are the primary focus of this essay.

This essay begins by briefly describing the rapidly evolving phenomenon of transect zoning and its companion, form-based coding. It then discusses four concerns raised by the current uses of both as public regulatory devices. The essay concludes by considering whether transect zoning and form-based codes can be redeemed without fundamentally altering their regulatory purpose, and it ultimately suggests that form-based codes may be most appropriate in situations approximating the private-development context rather than as a public regulatory scheme more generally.

¹³ Miami's new form-based code has approximately 490 pages; Denver's new code has approximately 1150 pages. See MIAMI21, *supra* note 10; DENVER, COLO., DENVER ZONING CODE, available at <http://www.denvergov.org/tabid/432507/default.aspx> (last visited Sept. 15, 2012); see also Jeffrey R. Purdy, *Form-Based Codes—New Approach to Zoning*, SMART GROWTH TACTICS, Dec. 2006, at 5 (noting the rigidity and extensiveness of form-based codes as a potential pitfall).

¹⁴ See UNIV. OF NOTRE DAME, PUBLIC AFFAIRS: EDDY STREET COMMONS, <http://publicaffairs.nd.edu/community-development/eddy-street-commons/> (last visited May 30, 2012); Kevin Allen, *Eddy Street Commons Impresses ND Fans*, SOUTH BEND TRIB., Sept. 5, 2010, at B1, available at http://articles.southbendtribune.com/2010-09-05/news/29169071_1_eddy-street-commons-campus-fans.

¹⁵ I could offer any number of rational planning justifications for this view, but mostly, I just think that they look nicer.

I. TRANSECT ZONING IN THEORY AND PRACTICE

New urbanists borrow the concept of the *transect* from biologists and ecologists, who use the transect—a cut or a path through part of the environment showing a range of different habitats—to study the symbiotic elements of natural habitats.¹⁶ The concept of the *urban transect* is the intellectual brainchild of architect Andres Duany, one of the founders of the new-urbanist movement. In 2003, Duany’s firm, Duany, Plater-Zyberk & Company, released the first transect-zoning code, “SmartCode.” This code articulated progressively less dense “transect zones”—urban core, urban center, general urban, suburban, rural, and natural.¹⁷ Subsequent transect-zoning schemes, by and large, have adopted this formula (depicted in Figure 1 below), which assumes a natural progression of urban development from more to less dense. As the Center for Applied Transect Studies asserts, “Before the automobile, American development patterns were walkable, and transects within towns and city neighborhoods revealed areas that were less urban and more suburban in character. This urbanism could be analyzed as natural transects are analyzed.”¹⁸

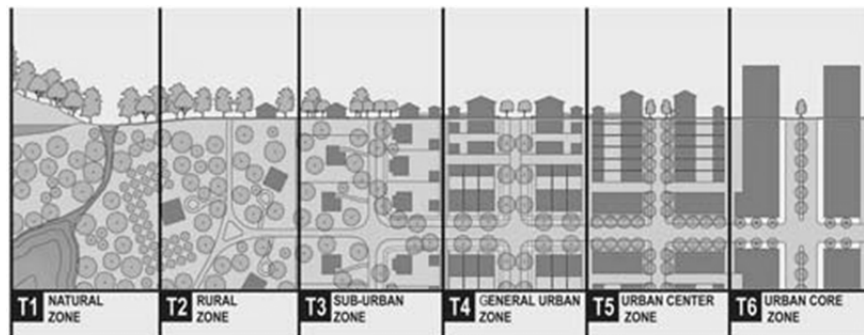


Figure 1. The Urban Transect¹⁹

Drawing upon this concept, proponents of transect zoning urge regulators to scrap traditional zoning codes, which regulate based upon property *uses*, in favor of a regulatory system that targets building density and form. Thus, transect zoning permits a wide variety of land uses throughout a

¹⁶ *The Transect*, CTR. FOR APPLIED TRANSECT STUDIES, <http://transect.org/transect.html> (last visited May 1, 2012).

¹⁷ DUANY ET AL., *supra* note 5, at xi.

¹⁸ *The Transect*, *supra* note 16.

¹⁹ Ctr. for Applied Transect Studies.

community, so long as these uses are carried out in buildings that are appropriate in size and design to the zone where they are located.²⁰

Proponents of transect zoning argue that the codes defining the appropriate building forms along the transect—known in the vernacular as “form-based codes”—ought to be “simple” and short.²¹ In implementation, however, these codes frequently fail to live up to the ideal. Indeed, to borrow from Vicki Been and Bob Ellickson’s description of building codes, form-based codes can be “technical document[s], whose level of difficulty at places may rival that of the Internal Revenue Code.”²² New urbanists have specific ideas about how buildings should look: they should not only be architecturally *appropriate* but also *welcoming* in their details.²³ Many form-based codes favor “traditional” building designs—that is, those reminiscent of the pre-zoning communities that new urbanists champion as a planning ideal.²⁴ And, while most new urbanists argue that form-based codes are distinct from architectural regulations, in practice, many form-based codes mandate architectural design elements, as illustrated below in Figure 2.²⁵

²⁰ See PAROLEK ET AL., *supra* note 6, at 18-19.

²¹ *Id.* at 39.

²² ROBERT C. ELICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 447 (3d ed. 2005).

²³ See generally KRIER, *supra* note 2.

²⁴ See *id.* at 239, 247-50 (touting the values of traditional architecture and its applicability to modern planning).

²⁵ See Berg, *supra* note 11, at 50-52.

Triangle Overlay District

00

3. For buildings longer than 100 feet, there shall be a minimum of one (1) usable entrance every full 50 feet of frontage along the front public sidewalk and shall provide architectural variation to visually break the building up.
4. Garage doors shall not be permitted on a front façade.

B. Windows and Doors

1. **Storefront/Ground Floor.** Ground floors shall be designed with storefronts that have windows, doorways and signage, which are integrally designed and painted. No less than 70% of the storefront/ground floor façade shall be clear glass panels and doorway. Glass areas on storefronts shall be clear, or lightly tinted. Mirrored glass is prohibited. Required window areas shall be either windows that allow views into retail space, working areas or lobbies, pedestrian entrances, or display windows set into the wall. Windows shall not be blocked with opaque materials or the back of shelving units or signs. The bottom of the window must be no more than 3 feet above the adjacent exterior grade.
2. **Entranceway.** The front entranceway shall be inset 3 feet from the front building wall.
3. **Upper Stories.** Openings above the first story shall be a maximum of 50% of the total façade area. Windows shall be vertical in proportion.

The following example is intended to illustrate the application of the design standards in this ordinance. It shall not be interpreted as requiring a specific architectural style or kind of materials in design.



C. Roof Design

1. Unless otherwise approved by the Planning Board, buildings should have flat roof appearance from the street with a decorative cornice that is designed proportionate to the size of the building and length of the wall.
2. The Planning Board may permit a pitched roof; however, mansard roofs shall not be permitted on single story buildings. Pitched and mansard roofs shall not be permitted with eaves below a height of 20 feet. All roof edges shall be accentuated in a manner proportionate to the size of the building and length of the wall.
3. Flat roofs shall be enclosed by parapets.
4. All rooftop mounted equipment shall be screened from view on all sides of the building.
5. Parapets and other screening treatment shall use high quality building materials and shall blend with the design of the building in terms of color, materials, scale and height.

D. Building Materials. The following exterior finish materials are required on the front façade and any façade facing a street, plaza, park or parking area. These requirements do not include areas devoted to windows and doors.

1. All walls exposed to public view from the street, or parking area shall be constructed of not less than 60% brick, stone or glass. Panel brick and tilt-up brick textured paneling shall not be permitted.
2. The remaining façade may include wood siding or fiber cement siding. Exterior insulation finish systems (EFIS) may be used for architectural detailing above the first floor.
3. Buildings that have upper stories shall be designed to create a distinct and separated ground floor area through the use of accent such as a string course, change in material or textures, or an awning or canopy between the first and second stories.

E. Awnings. Storefronts may be supplemented by awnings, which give shade and shelter or add color and visual interest to the entry or display window of the storefront, provided that the following conditions are met:

1. Awnings may project over the public sidewalk with a minimum 8 foot clearance provided from the sidewalk, but must be a minimum of 5 feet from the street curb.



00-4 | City of Birmingham, Michigan, Zoning Ordinance

Draft 3 - 5/16/2007

ArtiCie

Figure 2. Example of Form-Based Code²⁶

There are both practical and theoretical reasons why architectural details pervade transect-zoning regulations. Practically, determining which building “forms” belong in a given transect zone is not a self-evident proposition but rather must be spelled out in architectural codes, such as the one

²⁶ City of Birmingham, Michigan.

reproduced above in Figure 2.²⁷ Moreover, detailed architectural restrictions may placate groups that are resistant to regulatory changes favoring mixed land uses—particularly homeowners concerned about protecting their property values from externalities that nonresidential land uses may generate.²⁸ Theoretically, many new urbanists believe that our society’s idea of what constitutes “good” urban environments has been corrupted by decades of zoning. Therefore, they believe that pervasive and comprehensive government regulation is required in order to mandate those environments. As James Howard Kunstler argues:

The public consensus about how to build a human settlement . . . has collapsed. Standards of excellence in architecture and town planning have collapsed What was thrown away must now be reconstructed, spelled out, and reinstated. The New Urbanism proposes to accomplish this through formal codes. . . . The[se] codes will invoke in words and graphic images standards of excellence that previously existed in the minds of ordinary citizens but which have been forgotten and forsaken. The codes, therefore, aim to restore the collective cultural consciousness.²⁹

In other words, many new urbanists do not believe that an acceptable built environment can be achieved through private ordering but rather that it must be accompanied by regulations dictating the building design elements.

II. THE RISKS OF TRANSECT ZONING

As a result, what transect zoning offers in terms of stylized simplicity is often more than offset by the technical details that accompanying form-based codes incorporate. This

²⁷ See Elizabeth Garvin & Dawn Jourdan, *Through the Looking Glass: Analyzing the Potential Legal Challenges to Form-Based Codes*, 23 J. LAND USE & ENVTL. L. 395, 406 (2008); Kenny Be, *Everybody Must Get Zoned: Kenny Be Looks at Denver’s New Zoning Rules*, DENVER WESTWORD BLOGS (Jan. 20, 2010, 8:36 AM), http://blogs.westword.com/latestword/2010/01/everbody_must_get_zoned.php?page=1 (noting that at “730 pages, not including 76 neighborhood maps and six Overlay District maps, the new zoning code is being called an improvement. It is a control-freak fantasy, with detailed rules for every aspect of city life.”).

²⁸ The literature on the political economy of land use regulation, and especially the influence of homeowners in the regulatory process, is vast. See generally LEE ANNE FENNELL, *THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES* (2009); WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001); see also, e.g., Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 388-89 (1977).

²⁹ JAMES HOWARD KUNSTLER, *HOME FROM NOWHERE: REMAKING OUR EVERYDAY WORLD FOR THE 21ST CENTURY* 134-35 (1996).

reality raises a number of related concerns that deserve serious consideration and are discussed below.

A. *Increased Development Costs*

As even some proponents acknowledge, form-based codes frequently impose high compliance costs.³⁰ These costs flow in large part from the imposition of architectural standards, which, at a minimum, require securing the services of an architect to ensure compliance but may also require expensive materials.³¹ This extra layer of difficulty supplements preexisting regulations of “building form,” including building codes and the accessibility regulations of the Americans with Disabilities Act (ADA).³² Moreover, the public-choice realities discussed above often require that form-based codes supplement, rather than supplant, preexisting zoning regulations.³³ Essentially, these codes are the equivalent of

³⁰ See, e.g., Joseph E. Gyourko & Witold Rybczynski, *Financing New Urbanism Projects: Obstacles and Solutions*, 11 HOUSING POL’Y DEBATE 733, 739-40 (2000) (concluding, based on an extensive survey of builders and developers, that new urbanist projects are more expensive); Philip Langdon, *The Not-So-Secret Code: Across the U.S., Form-Based Codes Are Putting New Urbanist Ideas into Practice*, AM. PLAN. ASS’N, Jan. 2006, at 24, 28 (asserting that the cost of form-based codes “exceeds that of a conventional land-use plan” making citywide form-based coding “prohibitively expensive”).

³¹ See PLANNING DESIGN GRP., ECONOMIC RETURN ON NEW URBANISM 1, 3 (2007) (asserting that the 15% to 30% increased costs associated with New Urbanism in Central Florida are due primarily to architectural design, increased infrastructure and additional operation and maintenance costs); Ajay Garde, *Designing and Developing New Urbanist Projects in the United States: Insights and Implications* 11 J. OF URB. DESIGN 33, 43-44 (2006) (noting that architectural features, materials and highly detailed design codes are cost burdens associated with New Urbanism).

³² See, e.g., CNTY. OF SANTA BARBARA PLANNING & DEV. DEPT., LOS ALAMOS BELL STREET DESIGN GUIDELINES 24 (2011) (mandating that ramps and guiderails should complement the overall design intent while conforming with existing building code and ADA requirements). For a discussion of general building costs associated with ADA compliance, see John Haman, *Cost of ADA Compliance Unavoidable for Builders*, ARK. BUS., Mar. 17, 1997, at 31, available at <http://bi.galegroup.com/essentials/article/GALE|A19405289/7f9e54986aa0df2a9b2efb8435e803e1>; see also ELLICKSON & BEEN, *supra* note 22, at 452 (noting that some critics believe that ADA regulations are not cost justified).

³³ See Kaizer Rangwala, *Hybrid Codes Versus Form-Based Codes*, NEW URB. NEWS, May 2009, at 13 (noting that, despite plans for city-wide form-based codes, limited resources, development, and political pressures forced officials to adopt hybrid codes or overlay districts in Phoenix and Ventura); see also John M. Barry, *Form Based Codes: Measured Success Through Both Mandatory and Optional Implementation*, 41 CONN. L. REV. 305, 331 (2008) (offering parallel form-based codes that supplement conventional zoning as a solution when there is public opposition to mandatory form-based codes); DONALD L. ELLIOTT, *A BETTER WAY TO ZONE: TEN PRINCIPLES TO CREATE MORE LIVEABLE CITIES* 37-38 (2008) (asserting that form-based codes are likely to supplement rather than replace conventional zoning because of lack of time, money, and political support).

highly technical performance-zoning overlays.³⁴ Anecdotal evidence suggests that compliance costs have stalled some redevelopment efforts governed by form-based zoning.³⁵

B. *Imposition of a Uniform Urban Aesthetic*

Real estate developments governed by transect zoning and form-based codes look and feel very different from the developments (both urban and suburban) that preceded them for decades. As previously acknowledged, I happen to share the new urbanists' aesthetic preferences that produce this look and feel. This fact, however, does not alleviate my concerns about using the law to impose aesthetic preferences on the built landscape. On the contrary, if the new urbanists' critique of twentieth-century planning practices teaches anything, it is that using public land use regulations to impose architectural fads on the urban landscape can lead to unfortunate, even socially damaging, results.³⁶ Interestingly, architects have opposed the imposition of transect zoning in some jurisdictions

³⁴ Performance zoning regulates land use by establishing parameters designed to limit the negative impact of the use. Although performance zoning is more flexible than conventional zoning, it is often difficult to administer and no major city has replaced Euclidean zoning in favor of performance zoning. See JULIAN CONRAD JUERGENSEMEYER & THOMAS ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* 101 (2d ed. 2007); ELLIOTT, *supra* note 33, at 23-26. For an example of a highly detailed form-based overlay, see Jeremy E. Sharp, *An Examination of the Form-Based Code and Its Application to the Town of Blacksburg 21* (Nov. 4, 2004) (unpublished Masters in Urban & Regional Planning thesis, Va. Polytechnic Inst. & State Uni.), available at <http://scholar.lib.vt.edu/theses/available/etd-12172004-140622/unrestricted/SharpFINALmajorpaper.pdf> (noting that South Miami's highly detailed form-based overlay regulates the uses on each floor of buildings in the urban zone).

³⁵ See Robert Steuteville, *Survey: Combine New Code with Activities and Investment*, *NEW URB. NEWS*, Apr. 1, 2010, at 7 (noting that only twenty-nine percent of the communities that adopted form-based codes during or after 2007 have had projects built); Mark Simpson, *Cost and Business Resistance Kill Orlando Suburb Beautification and Traffic Calming Effort*, *TRANS. NATION* (Apr. 2, 2011), <http://transportationnation.org/2011/04/02/cost-and-business-resistance-kill-orlando-suburb-beautification-and-traffic-calming-effort/> (noting the cost of a form-based redevelopment project as a reason for its rejection); Ed Tombari, *The Future of Zoning?*, 22 *LAND DEV.* 23, 25 (2009) (noting development drawbacks to Arlington, Virginia's form-based overlay that include having to go back to the Planning Board in order to make minor façade changes).

³⁶ See, e.g., EMILY TALEN, *CITY RULES: HOW REGULATIONS AFFECT URBAN FORM* 133 (2011); Keith Aoki, *Race, Space and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning and Gentrification*, 20 *FORDHAM URB. L.J.* 699, 700 (1992); D. Bradford Hunt, *What Went Wrong with Public Housing in Chicago? A History of the Robert Taylor Homes*, 94 *J. IL. STATE HIST. SOC'Y* 96, 97 (2001) (citing the CHA's decision to build high-rises as part of the reason for the failure of the Robert Taylor Homes).

precisely because they worry about a legally imposed urban aesthetic.³⁷

Transect zoning and form-based codes seek to reverse over a century of planning practices that reflect what the new urbanists consider wrongheaded aesthetic preferences. In fact, new urbanism arises as a response to (and rejection of) not only the single-land-use world that zoning regulations created but also the dominant post-war suburban aesthetic that previous generations of planning professionals preferred.³⁸ As Richard Chused has devastatingly documented, the Progressive Era proponents of zoning believed they could solve urban problems by legislating a planned order and rejecting the traditional “organic” one that new urbanists have since adopted.³⁹ The rapid expansion and democratization of suburban development after World War II enabled these planning ideals to be imposed legislatively *ex ante*, thus guaranteeing an anti-urban aesthetic on wide swaths of the American built environment.⁴⁰

The urban-renewal experience even more vividly illustrates the danger of imposing a uniform aesthetic through public land use regulations. The “urban renewal” ideal emerged during the middle of the twentieth century when planning intellectuals became convinced that American cities were in a state of rapid deterioration.⁴¹ City planners and municipal leaders hoped to renew urban communities primarily through the wholesale destruction and reconstruction of existing neighborhoods, which would transform communities mired in pre-zoning, mixed-use patterns into communities developed pursuant to a rational plan.⁴² The goal, in the words of one

³⁷ See generally Berg, *supra* note 11.

³⁸ See KRIER, *supra* note 2, at 11-13 (noting the “fiasco of the suburbs is the tragic illustration” of “erroneous [urban] planning” and architectural design); Gabriele Tagliaventi, *Something Has Changed*, 1 A&C INT’L J. ARCHITECTURE & URBANISM 9, 11-12 (2002) (noting the new forms and architectures of the post-war era as reasons for the decline of urban culture).

³⁹ See generally Richard Chused, *Euclid’s Historical Imagery*, 51 CASE W. RES. L. REV. 597, 598-99 (2001) (discussing the ideological priors of early zoning proponents).

⁴⁰ See NICOLE STELLE GARNETT, *ORDERING THE CITY: LAND USE, POLICING, AND THE RESTORATION OF URBAN AMERICA* 41-43 (2010) (describing the FHA’s role in shaping post-war suburbia).

⁴¹ See generally, *e.g.*, BERNARD J. FRIEDEN & LYNNE B. SAGALYN, *DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES* 15-37 (5th prt. 1994) (summarizing history of urban renewal); JON C. TEAFORD, *THE ROUGH ROAD TO RENAISSANCE: URBAN REVITALIZATION IN AMERICA, 1940-1985*, at 44-81 (1990) (same).

⁴² See, *e.g.*, FRIEDEN & SAGALYN, *supra* note 41, at 16 (Planners believed that the existing cities were obsolete and that “[t]o replace the obsolete city with this new vision would mean tearing down much of what was there.”); LOUIS JUSTEMENT, *NEW CITIES FOR OLD: CITY BUILDING IN TERMS OF SPACE, TIME, AND MONEY* 3 (1946) (“The

proponent, was “to reconstruct the city . . . [by] building everything in its proper place.”⁴³ In other words, urban “renewal projects sought to ‘modernize’ the city by replacing mixed-use neighborhoods with” the single-use communities that new urbanists condemn. “Planners also were enamored of modernist architecture and favored unadorned, sterile buildings, set apart from [traditional urban neighborhoods].”⁴⁴ Today, urban renewal is not only widely condemned on humanitarian, architectural, and planning grounds,⁴⁵ but perhaps most ironically, city planners are demolishing urban-renewal-era projects and replacing them with new-urbanist projects like those destroyed in the name of renewal a half century ago.⁴⁶

The new urbanists assure skeptics that the aesthetics reflected in form-based codes are not problematic because they reflect a consensus developed during participatory planning sessions known as “charrettes.”⁴⁷ Furthermore, they promise that form-based codes can be amended to reflect shifting aesthetic preferences.⁴⁸ These assurances do not sufficiently assuage my anxieties. After all, traditional zoning practices are themselves localized and participatory, and they have produced the precise aesthetic that new urbanists reject. Moreover, an urban aesthetic resulting from past legal mistakes is more difficult to change than the law itself. Buildings, it turns out, are more permanent than words.

time has come to rebuild our cities. The mere redevelopment of blighted areas will not provide the inspiration that we shall need to achieve the . . . goal of arresting further urban decay.”); LEWIS MUMFORD, FROM THE GROUND UP 226-29 (1956) (arguing that clearance was the only solution to cities’ problems); TEAFORD, *supra* note 41, at 105 (characterizing the “eradication of slums” as the “ultimate dream of planners”).

⁴³ LUDWIG HILBERSEIMER, THE NEW CITY: PRINCIPLES OF PLANNING 158 (1944).

⁴⁴ GARNETT, *supra* note 40, at 45.

⁴⁵ See *id.*; see also, generally, e.g., MARTIN ANDERSON, THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL (1964) (arguing that the costs of urban renewal vastly outweighed the benefits); ELLICKSON & BEEN, *supra* note 22, at 841-42 (noting numerous critiques of urban renewal).

⁴⁶ See GARNETT, *supra* note 40, at 154 (describing urban redevelopment programs that replace modernist high-rise structures with new-urbanist style buildings); Catesby Leigh, *New Urbanists Point the Way Forward*, CITY J. (Apr. 18, 2008), <http://www.city-journal.org/2008/bc0418cl.html> (noting that New Urbanists are replacing dysfunctional urban-renewal housing with a more traditional approach to design).

⁴⁷ *Public Outreach: What is a Charette?*, TOWN PAPER, http://www.tndtownpaper.com/what_is_charrette.htm (last visited Nov. 30, 2012).

⁴⁸ See, e.g., Berg, *supra* note 11, at 53.

C. *The Anachronistic Nature of the Urban Transect*

The foundational planning principle of new urbanism, reflected in the concept of the urban transect, is that urban development “naturally” proceeds from more to less dense—from urban, to suburban, to rural.⁴⁹ After decades of zoning, however, the urban transect reflects new urbanists’ preferences and aspirations for urban development rather than the actual facts on the ground in most American communities. In many places, urban development no longer proceeds neatly along the “transect” that new urbanists would like to impose through regulation. On the contrary, the density gradients⁵⁰ of some metropolitan areas (for example, Los Angeles) either are flat or proceed from less dense, to more dense, to less dense again.⁵¹ While new urbanists would like to reverse this trend, they have not satisfactorily addressed how to confront communities with development patterns that fail to approximate the urban transect. In fact, transect zoning has been imposed in locales where development patterns are entirely divorced from the urban transect’s predictions (for example, Arlington, Virginia).⁵² And not surprisingly, in these places, the “transect” is defined to fit existing development patterns rather than the ideal progression new urbanists prefer.⁵³

⁴⁹ See DUANY ET AL., *supra* note 5, at vii; Emily Talen, *Help for Urban Planning: The Transect Strategy* 7 J. URB. DESIGN 293, 294 (2002) (analogizing urban systems to the natural spatial ordering of ecosystems).

⁵⁰ Density gradients measure the variation in population density as one moves away from a city center. See ROBERT BRUEGMANN, *SPRAWL: A COMPACT HISTORY* 19 (2005).

⁵¹ See *id.* at 20 (noting that the density gradients of London and other major cities have flattened over time); Nicole Stelle Garnett, *Save the Cities, Stop the Suburbs?*, 116 YALE L.J. 598, 604 (2006) (noting that density gradients flattened as a result of rapid suburbanization in the twentieth century); Matthew Luck & Jianguo Wu, *A Gradient Analysis of Urban Landscape Pattern: A Case Study from the Phoenix Metropolitan Region*, 17 LANDSCAPE ECOLOGY 327, 333-34 (2002) (finding that Phoenix’s density patterns form more of a “U” shape, with density moving from less dense to more and then less dense); Jean-Paul Rodriguez, *Population Density by Distance from City Center*, http://people.hofstra.edu/geotrans/eng/ch6en/conc6en/distancedensity_sample.html (last visited Sept. 18, 2012) (depicting relative density gradients of select cities and noting that the gradients of American cities are generally flatter than Asian and European cities and in some instances peak at various peripheral points).

⁵² For illustrations of Arlington, Virginia’s scattered developmental density patterns, see ARLINGTON CNTY. PLANNING DIV., PLANNING RESEARCH & ANALYSIS TEAM, PLANNING RESEARCH BRIEF 7: FORECAST 8.0 & DENSITY, *available at* http://www.arlingtonva.us/departments/CPHD/planning/data_maps/page80626.aspx (last visited June 18, 2012).

⁵³ See ARLINGTON, VA., ZONING ORDINANCE, § 20, app. A (2003), *available at* <http://www.columbiapikeva.us/revitalization-story/columbia-pike-initiative/columbia-pike-form-based-code/> (providing for various revitalization districts rather than following the progressive transect pattern); PLAN CINCINNATI: DRAFT PLAN,

D. *The Vagueries of Jargonistic Regulation*

As previously discussed, most transect-zoning schemes favor a particular urban aesthetic. To impose this aesthetic, many form-based codes incorporate new-urbanist jargon that can be baffling to outsiders.⁵⁴ For example, the Park East Development Code, which regulates a redevelopment area in Milwaukee, Wisconsin, provides the following guidance to developers:

- “Street level facades shall include visual features and design details that enrich the pedestrian experience. While visual interaction with all stories of the building is encouraged, visual interaction by means of clear, non-tinted windows (glazing) is required along the street frontage of a building.”⁵⁵
- “[T]he area behind the glazing must be Street Activating Uses . . . Street Activating Uses are those open to the public . . . Street Activating Uses can also include areas that are not open to the public, yet still activate the street.”⁵⁶
- “Detailing of the base of the buildings should be used to enhance the human scale qualities of the building.”⁵⁷

This kind of jargon, which pervades form-based codes, poses both legal and practical difficulties. Legally, the Supreme Court’s “vagueness” doctrine makes clear that the Due Process Clause requires laws to provide clear notice of what is expected for compliance as well as guidelines for government officials charged with enforcement.⁵⁸ Practically, even if form-based codes are not unconstitutionally vague, many undoubtedly

<http://www.plancincinnati.org/#draft> (last visited June 19, 2012) (showing disparate areas of activities targeted for transect-zoning); *see also* ELLIOTT, *supra* note 33, at 31-32 (noting that because transect zoning is so ambitious, it has been adopted in only a few cities and, where adopted, is “mandatory in only specific areas of each city.”).

⁵⁴ *See* Garvin & Jourdan, *supra* note 27, at 400.

⁵⁵ CITY OF MILWAUKEE, PARK EAST REDEVELOPMENT PLAN: DEVELOPMENT CODE 6, ¶ 4.1.1 (2004), *available at* <http://city.milwaukee.gov/ImageLibrary/Groups/cityDCD/parkeast/plan/DevelopmentCode/DevCodeChap1.pdf>.

⁵⁶ *Id.* ¶ 4.1.2.

⁵⁷ *Id.* at 8, ¶ 4.1.5.

⁵⁸ *See* *City of Chi. v. Morales*, 527 U.S. 41, 64 (1999) (invalidating Chicago’s Gang Congregation Ordinance on vagueness grounds); *Anderson v. City of Issaquah*, 851 P.2d 744, 751 (Wash. Ct. App. 1993) (invalidating architectural regulations on vagueness grounds and observing that “[a] statute which either forbids or requires the doing of an act in terms so vague that men [and women] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.” (alteration in original) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926))); Garvin & Jourdan, *supra* note 27, at 411-13.

necessitate consultation with architects who are conversant in new-urbanist jargon, further increasing compliance costs.

Unfortunately, the common alternative to these jargonistic details is to insert illustrative examples of appropriate buildings into form-based codes (often in the form of photographs, as illustrated below in Figure 3). This practice, however, does little to address vagueness problems.

10-50.20.030 Architectural Design Standards



Local examples of the use of brick, stone, rusticated block. Also note window type, proportions, and details.



Local examples of the use of horizontal lap siding and wood shingles, note the appropriate use of color on the siding and trim. Also note window type, proportions, and details.



Local example of the use of a combination of materials.

Local examples of the limited use of stucco in combination with other appropriate materials.

50.20-4

Flagstaff Zoning Code

Figure 3. Example of Form-Based Code with Illustrative Photographs⁵⁹

⁵⁹ Flagstaff, Ariz. Zoning Code § 50.20-4.

CONCLUSION: REDEEMING TRANSECT ZONING?

The question remains whether transect-zoning law and accompanying form-based codes can be amended to address these difficulties without fundamentally altering their regulatory purpose. In some senses, they cannot. To begin, as discussed above, the organizing concept of the entire regulatory scheme—the urban transect—simply does not reflect much of the American built landscape.⁶⁰ Somewhat ironically, then, using the transect as a guiding principle for land use regulation makes the most sense at opposite temporal ends of the development spectrum—that is, in very old communities, which evolved in a way that reflects the urban transect, and in very new communities, which can be built this way from the start. Moreover, the new urbanists' proposed swap of traditional use-based zoning with an alternative that enables mixed-use environments and tightly controls development is in one sense simply a bow to political realities. Control over land use regulation remains one of local governments' most significant powers, and local regulators are understandably reluctant to relinquish it.⁶¹ And, as discussed above, other stakeholders in the world of land use regulation—especially homeowners—are loath to embrace land use deregulation, which they view as a threat to housing values. Finally, even if it were practically possible to scrap the aesthetic controls embedded in form-based codes, it is doubtful that many new urbanists would accept the invitation to do so. After all, most new urbanists are architects with particular architectural preferences.⁶² Not surprisingly, therefore, a central purpose of most form-based regulations is an aesthetic one—namely, to regulate the *form* of buildings.

In the spirit of optimism, however, I close with two suggestions for local officials who may be weighing whether to

⁶⁰ See *supra* notes 49-52 and accompanying text.

⁶¹ See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 3 (1990) (“Land use control is the most important local regulatory power.”); Nicole Stelle Garnett, *Trouble Preserving Paradise?*, 87 CORNELL L. REV. 158, 181 (2001) (“Given the fact that local governments have no inherent power, it is understandable that local officials would fight to preserve the most significant power entrusted to them by state law.”).

⁶² The founders and members of The Congress for New Urbanism, for example, are mostly architects. See Cong. for New Urbanism, *CNU History*, <http://www.cnu.org/history> (last visited Sept. 5, 2012) (“The Congress for the New Urbanism was founded in 1993 by a group of enthusiastic architects looking to codify the thought behind their previous work in creating long-lasting and better-performing neighborhoods.”).

implement transect zoning and, if so, where and how to implement it. The first suggestion is to consider an option that I have previously defined as “[m]ixed-[u]se [z]oning without the [s]trings”—that is, simply amending zoning laws to permit a greater degree of land use diversity while eschewing the regulatory details that pervade most transect-zoning schemes.⁶³ This would achieve a core goal of transect zoning—more mixing of land uses—without raising the concerns raised above. The second suggestion is to embrace the basic concept of the transect (as amended in extant communities to fit the preexisting development patterns) while resisting the temptation to mandate the architectural details of buildings permitted within transect zones. In other words, transect zoning might offer guidelines about building size and density rather than building form and style.

I offer these suggestions in order of preference and with full recognition that, although I strongly favor mixed-land-use environments, these more libertarian regulatory alternatives would face significant political resistance. When public-choice impediments to deregulation prove insurmountable, transect and form-based regulations may prove most appropriate in the private-development context, where requirements regarding building forms are imposed by developers closely attuned to market demand. Beyond this context, their use as public regulatory devices is likely best confined to the situations that most engage developers and regulators in negotiations about development requirements, such as planned unit developments and development and community benefit agreements.⁶⁴ In these contexts, the bilateral nature of the regulatory negotiation process can provide a useful check on regulatory excess. At a minimum,

⁶³ GARNETT, *supra* note 40, at 200-01.

⁶⁴ Planned unit developments (PUDs) allow developers to create mixed-use communities provided they abide by standards set out in an officially approved plan. The PUD approval process encourages negotiation between developers and local governments through application conferences and conditional approvals. *See* JUERGENSMEYER & ROBERTS, *supra* note 34, at 283, 293. Development agreements arise from bilateral negotiations and “fix the rights of developers and municipalities as of a certain date and limit the power of government to apply new ordinances to approved projects.” *Id.* at 189. Community benefit agreements are “project-specific, negotiated agreement[s] between a developer and a broad community coalition that outlines the project’s contributions to the community and ensures community support for the project.” Partnership for Working Families, *Community Benefit Agreements*, <http://www.communitybenefits.org/article.php?list=type&type=155> (last visited Sept. 5, 2012).

the private parties who will be bound by the provisions governing building form will have an opportunity to help shape them.⁶⁵

⁶⁵ As other commentators have observed, these processes pose risks of coercion, on the part of regulators, and of rent seeking, on the part of developers. *See* ELLIOTT, *supra* note 33, at 20, 22 (noting that PUD negotiations may be vulnerable to misuse by cities that tailor their negotiating strategies to developers' weaknesses or, conversely, by sophisticated landowners that may hold stronger bargaining positions); Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5, 35 (2010) ("[N]egotiations between developers on the one hand, and either land use officials or community groups on the other, may . . . foster rent-seeking."); Alejandro E. Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions, Installment One*, 24 STAN. ENVTL. L.J. 3, 6 (2005) (arguing that bilaterally negotiated land use regulations like development agreements often favor developers and are vulnerable to unfair dealing). The Supreme Court has recognized the risk of unconstitutional governmental coercion in the land-use exaction context. *See* *Dolan v. City of Tigard* 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).