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New Urbanism and Euclidian Zoning: Can They Co-Exist?

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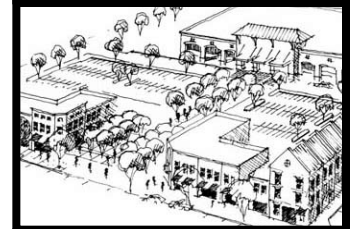
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Spring 2007

Land Use Clinic



university of georgia

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The **UGA Land Use Clinic** provides innovative legal tools and strategies to help preserve land, water and scenic beauty while promoting creation of communities responsive to human and environmental needs. The clinic helps local governments, state agencies, landowners, and non-profit organizations to develop quality land use and growth management policies and practices. The clinic also gives UGA law students an opportunity to develop practical skills and provides them with knowledge of land use law and policy.

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New Urbanism And Euclidian Zoning: Can They Co-Exist?

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March 2007

I. A Brief History of Zoning

A. Why Did Zoning Begin?

Zoning began to take form in Europe during the 19th century as communities attempted to separate industrial centers from residential development.¹ Later, in 1916, New York City adopted the first comprehensive zoning plan in the United States, creating use zones and height and bulk restrictions on buildings in an effort to address safety and health issues resulting from closely situated buildings.² Eventually other cities that wanted to improve their aesthetic appeal and general quality of life followed suit and enacted zoning plans designed to meet those needs.³ Communities began to adopt the pyramid-type zoning most of us are familiar with today, with the most restrictive district—single-family residential—at the top of the pyramid (a high land use) and the least restrictive district—industrial—at the bottom (a low land use).⁴ In between are multi-family and commercial use districts.⁵ Higher land use districts can occupy lower land use districts, but not vice versa.⁶ This type of zoning eventually became known as Euclidian Zoning, so-named after the seminal United States Supreme Court case.⁷

1 See Chad Lamer, *Why Government Policies Encourage Urban Sprawl and the Alternatives Offered by New Urbanism*, 13 Kan. J.L. & Pub. Pol’y 391, 393 (2004) (noting London and Paris as two cities where zoning proved very successful).

2 See *id.* (discussing NYC’s concern of potential wide-spread fires and lack of light and air).

3 See *id.* (describing “city beautiful” and “garden city” movements).

4 *Id.* at 395.

5 *Id.*

6 *Id.*

7 For a discussion of *Village of Euclid v. Ambler Realty Co.*, 272

B. The Result of Zoning

Although Euclidian zoning has certainly served its purpose of separating land uses, many critics claim that this type of zoning creates “sprawl.”⁸ In his discussion of sprawl, Chad Lamer describes the “five different components that can be found in most sprawling North American cities.”⁹ They are (1) cluster or pod development that creates “res-identical” look-a-like neighborhoods, (2) malls, strip commercial developments, and conveniences stores, (3) office parks, (4) scattered civic institutions, and (5) roadways.¹⁰ In addition to dissatisfaction with the resulting look-a-like communities lacking a sense of place and character, familiar complaints about sprawl are that it affects the quality of life in a city economically because more services are needed to address developments farther and farther from the city and that sprawl consumes agricultural land, wetlands, forests, and open space.¹¹ Finally, sprawl is known as a contributor to America’s dependence on the automobile and to the consistently increasing number of miles driven by Americans every day.¹² Other attacks on Euclidian zoning point to its very nature. It does not allow for mixed uses, it often separates the economic classes in an exclusionary way, and it fails to address design issues.¹³ In response to these criticisms, suggested alternatives to Euclidian zoning abound. One of those alternatives is New Urbanism.

U.S. 365 (1926), the seminal Supreme Court case upholding the “constitutionality of zoning and the separation of land-uses,” see *id.* at 394.

8 See, e.g., *id.* at 395-96 (noting that cumulative zoning fostered “sprawling pattern” seen in cities today). But *cf.* Holcombe, “The New Urbanism Versus the Market Process,” 8 Austrian Scholars Conference, Ludwig von Mises Inst. (2002), available at <http://www.mises.org/asc/2002/ASC8-Holcombe.pdf> (discussing sprawl as a solution to pollution problems, rather than instigator of such problems).

9 See Lamer, *supra* note 1, at 396 (utilizing Andres Duany’s five component breakdown of sprawl).

10 *Id.*

11 *Id.* at 399-400.

12 See *id.* at 400 (discussing research that demonstrated a direct relationship between sprawl and miles driven and other issues resulting from increased dependence on automobile).

13 See Brian W. Ohm & Robert J. Sitkowski, *The Influence of New Urbanism on Local Ordinances: The Twilight of Zoning*, 35 Urb. Law. 783, 784 (2003) (discussing precursors to New Urbanism).

II. New Urbanism as the “New” Alternative

A. History of New Urbanism

In the 1990s, some of the nation’s premier designers of cities and neighborhoods met to discuss the many problems associated with suburban sprawl, including race separation, income disparities, environmental degradation, and widespread automobile use.¹⁴ Many participants of the meeting formed the Congress for the New Urbanism, an organization that argues for a restructuring of public policy “to create diverse neighborhoods that are designed for pedestrians as well as the automobile.”¹⁵ The New Urbanist concept attempts to address suburban sprawl through design principles that promote more traditional type neighborhoods and create “human-scale, walkable communities.”¹⁶

B. New Urbanism Principles

New Urbanism, also referred to as neotraditional design, transit-oriented development, and traditional neighborhood development (TND), is approached in many different ways.¹⁷ From infill projects to transit-oriented projects, and from traditional architecture to architecture with a modern flair, primarily all New Urbanism projects focus on the “power and ability of traditional neighborhoods to restore functional, sustainable communities.”¹⁸ New Urbanism does not strive to “replicate old communities” but instead creates communities that are based on *traditional* community principles with *modern* amenities demanded by consumers.¹⁹ For example, communities based strictly on traditional neighborhood design might lack sufficient parking for today’s consumers, but New Urbanism communities attempt to meet that need while promoting a more pedestrian friendly and transit-system-oriented lifestyle.²⁰ Further, historic

cities employed a “relentlessly regular” grid; New Urbanism communities modify that grid with T-intersections to slow and disperse traffic while creating a “neighborhood” network of pedestrian and cycling paths.²¹ In total, thirteen elements define the “heart of New Urbanism” that is the design of traditional neighborhoods:

- 1) The neighborhood has a discernible center. This is often a square or a green and sometimes a busy or memorable street corner. A transit stop would be located at this center.
- 2) Most of the dwellings are within a five-minute walk of the center, an average of roughly 2,000 feet [from dwelling to center].
- 3) There are a variety of dwelling types—usually houses, rowhouses and apartments—so that younger and older people, singles and families, the poor and the wealthy may find places to live.
- 4) At the edge of the neighborhood, there are shops and offices of sufficiently varied types to supply the weekly needs of a household.
- 5) A small ancillary building is permitted within the backyard of each house. It may be used as a rental unit or place to work (e.g., office or craft workshop).
- 6) An elementary school is close enough so that most children can walk from their home.
- 7) There are small playgrounds accessible to every dwelling – not more than a tenth of a mile away.

²¹ *Id.*; see also Mark R. Rielly, *Neo-Traditional Neighborhood Development*, Pace Law School, Land Use Law Center, http://www.law.pace.edu/landuse/neo_rielly.html (last visited Feb. 23, 2007) (citing Walter Kulash, *Why TND Traffic Systems Work*, Florida Sustainable Communities Center (Jun. 24, 1999), <http://sustainable.state.fl.us/fdi/fsc/resource/articles/tnd1.htm#definition>).

TND streets are small, and connected into dense networks. On these streets, there is an emphasis on non-motorized travel, and on the overall quality of travel for the automobile traveler. There is, at the same time, a de-emphasis of the narrowly defined performance standards (mainly travel capacity and speed) that are dictating what our streets and suburbs look like today.

Kulash, *supra*.

¹⁴ See Lamer, *supra* note 1, at 401 (citing the Congress for The New Urbanism’s charter).

¹⁵ *Id.*

¹⁶ *Id.*; see also Robert Steuterville, “The New Urbanism: An Alternative to Modern, Automobile-oriented Planning and Development,” *New Urban News*, <http://www.newurbannews.com/AboutNewUrbanism.html> (last visited Feb. 18, 2007).

¹⁷ Steuterville, *supra* note 16.

¹⁸ *Id.*

¹⁹ *Id.* (emphasis added).

²⁰ *Id.*

- 8) Streets within the neighborhood form a connected network, which disperses traffic by providing a variety of pedestrian and vehicular routes to any destination.
- 9) The streets are relatively narrow and shaded by rows of trees. This slows traffic, creating an environment suitable for pedestrians and bicycles.
- 10) Buildings in the neighborhood center are placed close to the street, creating a well-defined outdoor room.
- 11) Parking lots and garage doors rarely front the street. Parking is relegated to the rear of buildings, usually accessed by alleys.
- 12) Certain prominent sites at the termination of street vistas or in the neighborhood center are reserved for civic buildings. These provide sites for community meetings, education, and religious or cultural activities.
- 13) The neighborhood is organized to be self-governing. A formal association debates and decides matters of maintenance, security, and physical change. Taxation is the responsibility of the larger community.²²

C. Challenges to Implementing New Urbanism Principles

For many communities, the challenge to implementing New Urbanism design principles is that strict Euclidian zoning regulations do not provide the mechanism for utilizing such design principles.²³ Various remedies exist for this problem, such as finding a way to work within existing zoning ordinances, making New Urbanism part of the “menu of options” available in existing ordinances,²⁴ rewriting entire zoning ordinances, or adopting the Smart Code.²⁵

22 See *id.* (citing Andres Duany and Elizabeth Plater-Zyberk’s description of New Urbanism design principles).

23 See Lamer, *supra* note 1, at 402 (discussing suggested goals for legislators and urban planners).

24 See Eric M. Braun, *Growth Management and New Urbanism: Legal Implications*, 31 Urb. Law. 817, 819 (1999) (discussing challenges of mixing New Urbanism and existing zoning); Ohm & Sitkowski, *supra* note 13, at 789 (discussing forms of new urbanism development options).

25 Ohm & Sitkowski, *supra* note 13, at 789-90.

Finding a way to work within existing zoning ordinances is probably the most difficult approach for implementing New Urbanism principles into community design. Euclidian zoning is based on the segregation of land uses, with single-family residences located far from employment and shopping districts.²⁶ The goal of Euclidian zoning is to separate residential districts from so-called “dirty” industry districts because of threats to public health, safety, and welfare.²⁷ As these zoning regulations have caused their own set of problems, including problems with infrastructure, degradation of natural resources, and general sprawl, the implementation of New Urbanism design is looked to as a potential solution. The two approaches, however, reveal pointed differences that potentially could lead to legal challenges.²⁸ For example, permitting commercial use in a residential area might be challenged as a zoning decision inconsistent with a municipality’s comprehensive plan, a violation of many states’ zoning enabling statutes, or as illegal spot zoning.²⁹

Communities may attempt to amend “zoning ordinances to modify the processes and standards used in their ordinances and to incorporate new urbanis[m] principles.”³⁰ For example, a municipality may adopt a “traditional neighborhood development district.”³¹ But these new processes may also lead to problems. For example, developers fear that the implementation of New Urbanism standards may lead to zoning boards making arbitrary decisions because of a lack of “objective, measurable standards that can be consistently implemented over time.”³² New Urbanism principles at their core are more flexible than Euclidian zoning principles and New Urbanism ordinances need to give developers flexibility in determining the best mix of uses to create a vibrant community.³³ For example, “[w]ithin a TND, the developer can mix and match the various types of

26 See Braun, *supra* note 24, at 818 (describing American zoning as it developed after World War II).

27 *Id.*

28 *Id.*

29 See *id.* at 819 (citing Daniel R. Mandelker, *Land Use Law* 27 (3d ed. 1993)); see also Mark R. Rielly, *supra* note 21 (discussing potential spot zoning challenges).

30 Ohm & Sitkowski, *supra* note 13, at 788.

31 *Id.* at 799.

32 Braun, *supra* note 24, at 819.

33 *Id.*

homes to suit site and market conditions without asking for further rezoning densities and lot sizes.”³⁴ This flexibility, however, may also provide developers with vague design standards as they move from town to town and the standards are subject to different interpretations.³⁵

Some cities have rewritten entire zoning ordinances, replacing conventional suburban standards with New Urbanism standards.³⁶ Many of these cities are older and larger cities with existing mixed-use development patterns that resulted from historic streetcar lines and more common pedestrian traffic.³⁷ In an ironic twist, many of these older cities had re-written their codes in the 1950s and 1960s to reflect suburban development and the desire for separate use.³⁸ Consequently there were many non-conforming uses due to conflicts between the traditional development pattern in place and the new suburban style of development.³⁹ Now cities, in an appreciation of the unique character an historic city possesses, have begun to revise their ordinances to reflect the city’s original style.⁴⁰

Smaller cities, too, are revising their zoning ordinances for the same reasons.⁴¹ Many of these cities, often in close proximity to major cities, are older communities also with historic development patterns.⁴² Unlike the larger cities, which are usually confined geographically in their growth, these smaller cities often are still “growing at the edges,” and the new ordinances are designed to keep the new growth in character with the older development.⁴³

Andres Duany’s Smart Code is another alternative to conventional zoning ordinances.⁴⁴ It is not an integrative code but is meant to co-exist with an existing zoning code as an overlay that identifies a continuum of rural to urban habitats varying in level and intensity of urban character, and creating different zoning categories, from rural preserve to urban core.⁴⁵ One problem, however, that new urbanism advocates have seen with the Smart Code is that developers do not take advantage of the codes when they are put in place as an optional alternative.⁴⁶ A town or city wanting to utilize the Smart Code may be better served by making the code mandatory.⁴⁷

D. Political Impediments to New Urbanism Ordinances and Market Forces

However, even if municipalities make it possible for developers to develop New Urbanism communities, the developers still may face strong opposition from citizens “suspicious of radical new development touting multifamily development and small lot subdivisions” and from citizens simply accustomed to large lots, privacy, and exclusivity.⁴⁸

Although there is not much case law on challenges to New Urbanism-style ordinances, one case illustrates potential political and legal challenges to come with the implementation of New Urbanism.⁴⁹ That case involved a neighborhood challenge to a rezoning of a single-family residential district to a planned development district, allowing for the construction

34 Comprehensive TND Ordinance, Georgia Department of Community Affairs, http://www.dca.state.ga.us/intra_nonpub/Toolkit/Guides/CompTNDOrd.pdf.

35 See Braun, *supra* note 24, at 819 (stating “[S]tate legislatures may have to amend zoning enabling legislation to provide local governments with the authority and guidance necessary to successfully implement New Urbanism theory.”).

36 Ohm & Sitkowski, *supra* note 13, at 788.

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.* (noting the cities of Belmont and Huntersville, North Carolina as examples). Rewriting zoning ordinances may seem like the best alternative, but it most likely requires initiative and support in the community, and most importantly, time. It may

be that the status quo is a difficult hump to get over for many communities.

44 See Ohm & Sitkowski, *supra* note 13, at 791 (discussing the code developed by Duany Plater-Zyberk & Company, a “leading firm in the new urbanism movement.”).

45 *Id.* (noting Sarasota, Florida as a city incorporating the Smart Code).

46 *Id.* (citing Philip Langdon, “Zoning Reform Advances Against Sprawl and Inertia,” 8 *New Urban News* 1 (Jan./Feb. 2003).

47 See, e.g., Philip Langdon, 2004: “A year of Ample Progress for New Urbanism,” 9 *New Urban News* 8 (Dec. 2004) (noting town of Leander, Texas’s success with implementing a mandatory Smart Code).

48 See Braun, *supra* note 24, at 820 (mentioning the oft-cited NIMBY principle and noting that developers may face extensive neighborhood opposition).

49 See Ohm & Sitkowski, *supra* note 13, at 792-93 (citing *I’On, LLC v. Town of Mt. Pleasant*, 526 S.E.2d 716 (S.C. 2000)).

of a New Urbanism-like community.⁵⁰ Neighbors strongly opposed the project and sought a referendum to restore the single-family residential zoning. The South Carolina Supreme Court upheld the rezoning.⁵¹ Although the court upheld the rezoning, will potential legal challenges deter developers from trying new designs? Probably not, if there is a market for them and money to be made, although developers may alter their designs to minimize conflicts.⁵²

This problem leads to another oft-presented question: Will markets “choose” New Urbanism design if it is available? Answers to this question diverge. Randall Holcombe, an economics professor at Florida State University, does not believe there is a market for New Urbanism-type communities.⁵³ After first arguing that sprawl does not harm open space, natural resources, or farmland, Holcombe suggests that sprawl is actually the *solution* to pollution and traffic congestion and that New Urbanism will actually create *more* polluted environments and *more* traffic for people.⁵⁴ He further states that “[i]f government-mandated restrictions are necessary to increase population density, this suggests that people, left to their own devices, would choose lower densities, so must be forced to live in higher-density conditions.”⁵⁵ Holcombe claims that as people gain wealth, they want more living space, not less, and cites as an example residents of Portland, Oregon, a city with very strict growth controls, who have purchased vacant lots adjacent to home sites to use as yards.⁵⁶ In conclusion, Holcombe suggests that people don’t want to live in high density areas and if are forced to buy small lots will simply find ways around a high density lifestyle.⁵⁷

50 See *id.* (noting that the planned development zoning was not a New Urbanism ordinance, but similar in that it allowed a mix of residential and commercial uses).

51 *Id.*

52 See *e.g.*, Mark R. Rielly, *supra* note 21 (noting a DeKalb County, Georgia developer who decreased density in his traditional neighborhood development project by 25% to gain neighborhood support) (citing Marianne Jaskevich, “Residents Unswayed by “New Urbanism” Tilt Factor: Dresden Drive Neighbors Fear Mixed-Use Project Will Bring Retail Use With It,” *Atlanta Journal-Constitution*, Apr. 8, 1999, at A13)).

53 Holcombe, *supra* note 8.

54 *Id.* (emphasis added).

55 *Id.*

56 *Id.*

57 *Id.*

But a study of the Kentlands project in Gaithersburg, Maryland challenges Holcombe’s argument.⁵⁸ Noting the conflicting views as to the appeal of high density New Urbanism type developments, Charles Tu and Mark Eppli asked, “Does new urbanism offer a desirable place to live, and are consumers willing to pay a premium for it?”⁵⁹ Focusing their study on Kentlands, a project designed by Andres Duany and Elizabeth Plater-Zyberk and a “model New Urbanism development,” the authors found that consumers were willing to pay a 12% premium for Kentlands property.⁶⁰ Although reflective of only one community, this study does suggest that there is a market for New Urbanism communities, in contrast to Holcombe’s suggestion that people must be forced to live in high-density areas and the suggestion that the South Carolina case involving neighborhood opposition foreshadows challenges to come. If a municipality or state desires to implement New Urbanism design principles into its future development because its constituents don’t believe that sprawl is actually the answer to environmental problems, it may be that education and marketing need to go hand in hand with any changes to existing zoning.

In fact, in some cases the *market* will actually educate the government as to the desirability of TNDs. In metro Atlanta, for example, counties and cities have been revising their ordinances in recent years to encourage mixed-use developments, a change that has been primarily driven by market desires.⁶¹ As Chamblee, Georgia city manager Kathy Brannon noted, “The change [in her city’s ordinances to allow for mixed-use communities was] market driven. People want to live in a community where they can walk to a store or restaurant” She also said, “[T]his generation is smarter than the ones before them. . . . [T]hey don’t want to spend their life in a car.” And Karen Mahurin of Cherokee County, which had its ordinances rewritten in 2006 to allow for TNDs, said, “[P]eople were sick of the basic type of zoning we were doing.

58 See Charles C. Tu & Mark J. Eppli, “Valuing New Urbanism: The Case of Kentlands,” 27 *Real Estate Economics* 425, 425 (1999) (finding that single-family homeowners are willing to pay a premium to reside in a New Urbanism community).

59 *Id.*

60 *Id.* at 447.

61 Christopher Quinn, “Village Fast Track,” *Atlanta Journal-Constitution*, Feb. 26, 2007, at D1.

. . . Sick of strip shopping centers . . . with the big parking lots . . .”⁶² These comments reflect a reality felt by many throughout the Atlanta area; as a result many TNDs have been and are being developed.⁶³

E. What if Localities Don’t “Choose” New Urbanism?

Despite the apparent existing ability to do so, many localities have not enacted New Urbanism type zoning ordinances, leading some state legislatures to “prompt” such enactment.⁶⁴ For example, in 2000 in response to Pennsylvania residents’ growing frustration over sprawl, then Pennsylvania Governor Tom Ridge signed a major reform package to update Pennsylvania’s Municipalities Planning code to promote “smart growth.”⁶⁵ Although New Urbanism type developments were arguably authorized before the reform package was enacted, few communities had New Urbanism type regulations.⁶⁶ Referring to the developments as Traditional Neighborhood Developments in the reform package, the purpose of the reform was not to require communities to draft such regulations but to “highlight TNDs as a viable alternative to building suburban single-family houses on one-acre lots.”⁶⁷ Today many Pennsylvania municipalities are developing TND ordinances, partly due to the legislation but also to the growing public interest in New Urbanism type communities.⁶⁸

Wisconsin took a much stronger approach to promote TNDs, with Wisconsin law now mandating that “every city and village with a population of at least 12,500 adopt a traditional neighborhood development ordinance by January 1, 2002.”⁶⁹ In doing so Wisconsin

sought to ensure that local governments don’t discourage traditional neighborhood developments, and to remove difficulties developers might face when proposing TNDs. However, cities are still given the option of how to treat the ordinance as a zoning district designation, for example as an overlay zone, a floating zone, or as a modified approach to planned unit developments, and the ordinance is not required to be mapped.⁷⁰

III. Conclusion

Euclidian zoning served a purpose in its time. It separated land uses so that people could live away from industrial developments without the fear that such industries would locate to their backyard. But despite the positive effects of Euclidian zoning, many people believe it provides too little attention to character and historic design and promotes sprawl. New Urbanism offers an alternative to Euclidian zoning and many cities are beginning to utilize New Urbanism principles as they strive to bring back a sense of place to their communities. Challenges result when the New Urbanism principles conflict with the zoning in place, but these challenges are not insurmountable. Finally, where there is market for New Urbanism communities developers should take advantage of a design concept that promotes the unique character and history that is a community and provides developers with the opportunity to provide the style of development consumers want.

62 *Id.* Chamblee’s TND ordinance is noted as one of the best in the region. *Id.*

63 See, e.g., Livable Communities Coalition, <http://www.livablecommunitiescoalition.org/Projects/quality-growth-success-models.cfm> (highlighting mixed-use development projects in the Atlanta area).

64 See Sitkowski et al, *Commentary: Enabling Legislation for Traditional Neighborhood Development Regulations*, American Planning Association (Oct. 2001), available at <http://www.planning.org/PEL/commentary/oct01comm.htm?> (noting Pennsylvania and Wisconsin as examples).

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.* (citing Wis. Stat. § 66.034(3)).

70 *Id.*

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