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Building by Right: Social Equity Implications of Transitioning to Form-Based Code

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and Adrienne L. Harreveld*

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I. Introduction

Zoning, whether with intent or by effect, has played a role in promoting municipal inequity¹ and perpetuating segregation.² The recent trend

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This article was born out of a University of Miami School of Law Environmental Justice Clinic project, in which we partnered with communities in unincorporated Miami-Dade County that had been directly impacted by the transition from traditional to form-based zoning. For their comments and support, we are grateful to Anthony Alfieri, Brittany Herbert, Daren Hooper, Alex Meyer, Theresa Pinto, Daniel Pollit, Madeline Seales, Justin Weatherwax, and our community partners throughout South Florida.

1. See, e.g., Elliott Anne Rigsby, *Understanding Exclusionary Zoning and Its Impact on Concentrated Poverty*, THE CENTURY FOUNDATION (June 23, 2016), <https://tcf.org/content/facts/understanding-exclusionary-zoning-impact-concentrated-poverty>.

2. Sacoby Wilson, Malo Hutson & Mahasin Mujahid, *How Planning and Zoning Contribute to Inequitable Development, Neighborhood Health, and Environmental Justice*, 1 ENVTL. JUST. 211, 212 (2008), www.ced.berkeley.edu/downloads/pubs/faculty/hutson_2008_environ-health.pdf. That municipalities are allowed to design their own zoning ordinances facilitates municipalities implementing planning and zoning standards and regulations, that address the desires of privileged populations and neglect the needs of disadvantaged populations. *Id.* Further, “[D]iscriminatory planning and exclusionary

of municipalities to transition their zoning frameworks from traditional codes to form-based codes³ has occurred with a sight to address urban concerns such as access to public transit and limiting urban sprawl, but has not focused on alleviating municipal equity concerns or even ensuring the implementation of the codes do not exacerbate existing inequities. Form-based codes⁴ currently affect almost fourteen percent of the U.S. population⁵ and provide an opportunity to create communities truly reflective of the democratic principles of equality, inclusion, and justice.⁶ However this aspiration can only be achieved if policies and practices that disproportionately harm or increase the likelihood of harm to vulnerable communities are contemplated and addressed. This article identifies through case studies the extent of community involvement in the decision-making process surrounding form-based codes and their potential discriminatory impact. Additionally, this article provides mechanisms to address these social equity issues that can be tailored to each community's unique experiences and needs. This article is not a critique of the merits of form-based codes as a regulatory tool for land development, but rather its purpose is to shed light on two aspects of implementation common to form-based codes across the country, the limited extent to which low-income minority communities are able to meaningfully participate in the decision-making

zoning contribute to unequal development within metropolitan areas. . . . This results in segregated communities along the lines of race and class and the creation of an urban underclass that is denied access to mainstream opportunities." *Id.* (internal citations omitted).

3. The vast majority (eighty-eight percent) of all form-based codes in the United States have been adopted after 2003, with the highest frequency of adoptions occurring between 2008 and 2010. See Hazel Borys & Emily Talen, *February 2017 Case Studies*, PLACEMAKERS, http://www.placemakers.com/wp-content/uploads/2012/08/CodesStudy_Feb-2017.htm (last visited Mar. 30, 2019).

4. Form-based codes are a type of zoning regulation that use aesthetic form rather than land uses as the organizing criteria for land development and, as such, encourage mixed-use development. In an interview with Public Square, Victor Dover, urban designer and the principal of Dover, Kohl & Partners Town Planning, explained: "A form-based code is organized around the type of place you're trying to create rather than land usage. Conventional zoning will have sections and subsections devoted to land uses, like residential, industrial or commercial, but form-based codes recognize that healthy cities are, first of all, mixed-use places and they depend on things that have more to do with physical design than land use, like the building-to-street relationship." Robert Steuteville, *Great Idea: Form-Based Codes*, PUBLIC SQUARE (May 10, 2017), <https://www.cnu.org/publicsquare/2017/05/10/great-idea-form-based-codes>.

5. *February 2017 Case Studies*, *supra* note 3 ("The population percentage is calculated at the time of adoption and therefore does not include any densification over time.").

6. "The political, legal, and moral equality of every citizen is a fundamental value of democracy. These aspects of equality are summarized in the idea that there can be no second-class citizens in democracy." CENTER FOR CIVIC EDUCATION, *ELEMENTS OF DEMOCRACY: THE FUNDAMENTAL PRINCIPLES, CONCEPTS, SOCIAL FOUNDATIONS, AND PROCESSES OF DEMOCRACY* 18 (2007).

process and the increased likelihood of displacement of these same communities, and to propose mechanisms that will strengthen form-based codes by addressing or decreasing the likelihood of these inequitable effects.

Form-based codes are touted as one of the only viable ways to combat the nationwide affordable housing⁷ and environmental crises⁸ perpetuated by urban sprawl.⁹ Form-based codes are a type of zoning regulation that streamline the approval process for mixed-use development in cities; encourage higher density¹⁰ and walkability;¹¹ and use aesthetic form

7. Danielle Arigoni et al., *Affordable Housing and Smart Growth: Making the Connection*, Smart Growth Network Subgroup on Affordable Housing 18–21 (2001), available at https://www.uc.edu/cdc/urban_database/housing/affordable_housing_and_smart_growth-making_the_connection.pdf (last visited Mar. 30, 2019). For general information on the current affordable housing crisis, see J. Ronald Terwilliger, *Solving the Affordable Housing Crisis: The Key to Unleashing America's Potential*, 26 J. Affordable Hous. & Cmty. Dev. L. 255 (2017) (In 2016, “nearly twenty-one million families paid rents considered unaffordable under federal standards. . . . Approximately eleven million of these households were ‘severely’ cost-burdened, spending in excess of fifty percent of their incomes on housing alone” (emphasis added)); see also Harvard Joint Center for Housing Studies, *America’s Rental Housing 2017*, at 26 (Dec. 2017), available at <https://www.jchs.harvard.edu/research-areas/reports/americas-rental-housing-2017> (last visited Mar. 30, 2019).

8. U.S. EPA, ABOUT SMART GROWTH, <https://www.epa.gov/smartgrowth/about-smart-growth#benefits> (last visited Mar. 30, 2019) (“Development guided by smart growth principles can minimize air and water pollution, reduce greenhouse gas emissions, encourage cleanup and reuse of contaminated properties, and preserve natural lands. . . . Smart growth practices can lessen the environmental impacts of development with techniques that include encouraging compact development, reducing impervious surfaces, safeguarding environmentally sensitive areas, mixing land uses (e.g., homes, offices, and shops), promoting public transit, and improving pedestrian and bicycle amenities.”).

9. Anne Maurer, *Smart Growth Principles and the Fair Housing Act: An Examination of the Loudoun County Revised General Plan*, 13 J. AFFORDABLE HOUS. & CMTY. DEV. L. 239, 241 (2004) (“The danger that it [urban sprawl] poses to the environment is particularly daunting, for [v]irtually every environmental problem—from air and water pollution to the destruction of wetlands and wildlife habitat, from global climate change to overflowing landfills—has been linked to the land consumption and pollution that result from current land use and transportation patterns.” (citing Oliver A. Pollard, III, *Smart Growth: The Promise, Politics, and Potential Pitfalls of Emerging Growth Management Strategies*, 19 VA. ENVTL. L.J. 247, 267–68 (2000))).

10. *The Charter of the New Urbanism*, CONGRESS FOR THE NEW URBANISM, <https://www.cnu.org/who-we-are/charter-new-urbanism> (last visited Mar. 30, 2019) (“Appropriate building densities and land uses should be within walking distance of transit stops, permitting public transit to become a viable alternative to the automobile.”).

11. *Id.* (“The physical organization of the region should be supported by a framework of transportation alternatives. Transit, pedestrian, and bicycle systems should maximize access and mobility throughout the region while reducing dependence upon the automobile.”).

rather than land use as the organizing criteria.¹² These codes are quite different from traditional or Euclidian zoning, the mainstay of zoning laws that for generations have divided land into zones with a specific regulatory character focused on the primary use (i.e., residential, commercial, industrial, agricultural),¹³ and contributed to the creation of the urban sprawl that form-based codes seek to alleviate.¹⁴ The shift from Euclidian to form-based code often requires a complete overhaul of municipalities' zoning regulations. Importantly, this overhaul can often occur in a single legislative action.¹⁵

Once a form-based code gets adopted, typically large areas are up-zoned—rezoned to increase intensity and/or density—in order to modify the urban design and to allow for mixed-use developments. Rezoning is a necessary component to transitioning to form-based code because it is the only way to implement the new urban planning and design vision in a traditionally zoned municipality. As traditional zoning separates land uses, this rezoning frequently consists of up-zoning to increase density and development often around mass-transit options. The areas that are up-zoned by form-based codes are often located where low-income minority communities that have been historically disenfranchised and discriminated against reside.¹⁶

12. "Form-based codes, pioneered in the 1980s, still address land use—keeping incompatible uses apart—but focus more attention on those physical aspects of private buildings that impact the quality of the public realm. . . . They also replace our current dangerous street standards with designs that encourage walking and biking." Jeff Peck, *A Step-by-Step Guide for Fixing Badly Planned Cities*, CITY LAB (Oct. 9, 2018), <https://www.citylab.com/design/2018/10/5-rules-designing-better-more-walkable-cities/569914> (last visited Mar. 30, 2019).

13. JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 4.2, at 80 (1998) (cited in *Black's Law Dictionary* under "Euclidean zoning").

14. Jason T. Burdette, *Form-Based Codes: A Cure for the Cancer Called Euclidean Zoning?* (2004) (unpublished Major Paper in support of Master of Urban and Regional Planning, Virginia Polytechnic Institute and State University, available at <https://pdfs.semanticscholar.org/d9a1/5fd1e4e64173b337a6cf4afacc9aaa2b51fd.pdf>).

15. See, for example, the creation of the Goulds Urban Center District, which significantly modified the zoning of a historically Black community in unincorporated Miami-Dade County through a single legislative act, discussed *infra* Sections III.C, V.

16. See, for example, Columbia Pike, a historically Black and Brown neighborhood in Arlington, Virginia, to the south of Arlington Boulevard (U.S. Route 50) which adopted a form-based code for commercial centers in 2003. According to Arlington County, "Arlington was one of the first jurisdictions in the nation to apply Form Based Codes to revitalize an existing, older community" and the form-based code is being used "to encourage mixed-use development and to foster a walkable, lively 'Main Street' atmosphere." Arlington County Gov't, PROJECTS & PLANNING: COLUMBIA PIKE FORM BASED CODE—COMMERCIAL CENTERS, <https://projects.arlingtonva.us/neighborhoods/commercial-form-based-code> (last visited Mar. 16, 2019). In an interview with Public Square, Victor Dover, urban designer and the principal of Dover, Kohl & Partners Town

Cities typically invest substantial time and resources to engage stakeholders (including developers and community members) *at the onset* of the process of transitioning to form-based codes. However, once executed, there exists limited opportunity for the meaningful participation of vulnerable communities and fewer avenues to ensure these communities are not disparately impacted. These issues can be addressed by providing for meaningful participation in project development and approvals after up-zoning has occurred and by implementing anti-displacement strategies to protect historically disenfranchised communities. Without additional

Planning responded to the question “Are you finding that elected officials, developers, planning staff, and citizens are becoming more accepting of the idea of code reform in the direction that New Urbanists are talking about?” by stating:

I have seen examples where they find their way through that thicket and one worthy example is Columbia Pike in Arlington, Virginia. It’s a corridor, already difficult to deal with as Geoff [Dyer, director of design and interim CEO at the City of Lafayette Downtown Development Authority] has mentioned, and a form-based code was adopted for the place. *Unlike the northern side of Arlington, it had seen very little reinvestment for 25 or 30 years. The only new things built during that period were fast food restaurants and car dealerships, mainly because of the so-called “The Arlington Way” in which developers willingly subjected themselves to years of endless hearings, negotiations and profers of various kinds of community benefits before they could get permission to build anything. They replaced that arduous process with the form-based code and development began immediately.* Developers had a pent up desire to make Columbia Pike more than it was but they weren’t able to get at it because the zoning and *tradition of decision-making stood in the way.* Once that changed with a form-based code, they reinvested hundreds of millions of dollars in the corridor.

Steuteville, *supra* note 4 (emphasis added). Surprisingly, there is no mention of the racial history of the north-south divide and its relationship to the lack of prior investment in the area. As a Jim Crow neighborhood, Columbia Pike was comprised of the county’s Black residents throughout the early twentieth century, and then after Jim Crow laws were abolished and the Fair Housing Act was adopted, “waves of Latino, Asian, and Middle Eastern immigrants” moved into the area due to the availability of affordable housing. G. Stephen Thurston, *Are There Two Arlingtons? Understanding the History Behind Arlington’s North-South Divide and How It’s Shaping Present-Day Perceptions and Realities*, ARLINGTON MAG. (Apr. 27, 2015), <https://www.arlingtonmagazine.com/are-there-two-arlingtons>. Meanwhile, north of Arlington Boulevard remained almost exclusively White and comprised of professionals and “old money.” *Id.* In 2013, Bailey Garfield, a local business owner, expressed his “worr[y] about his future in what is one of the last affordable parts of Arlington.” Patricia Sullivan, *Entrepreneurs and Residents Along Columbia Pike Wait to See What Redevelopment Brings*, WASH. POST (July 23, 2013), https://www.washingtonpost.com/local/businesses-watch-and-wait-for-columbia-pikes-future/2013/07/27/2dc9ee4c-cc8b-11e2-8845-d970ccb04497_story.html?utm_term=.d8fd38d5d444. He commented that the new luxury apartment buildings on Columbia Pike “have brought people with more disposable income” and his “biggest worry is escalating property values.” *Id.* Moreover, although further developments, including a streetcar and Metro stop, are expected, “the piecemeal development [as of 2013] has unleashed a wave of gentrification that worries longtime residents.” *Id.*

protections to the affected communities, the mass up-zoning and consequent development may occur without significant or meaningful public participation opportunities because form-based codes allow developments to be built as a matter of right,¹⁷ and thereby remove the little leverage that is afforded to communities through notice and public hearing requirements if the up-zoning were requested in traditional zoning. This process is concerning because, across the country, a consistent consequence of the implementation of form-based codes is the increased likelihood of displacement of minority communities coupled with fewer opportunities in the administrative process to voice their concerns.

This article addresses the impacts of form-based codes on communities' abilities to participate meaningfully in the development activities in the places where they live. Following the Introduction in Part I, Part II provides background on form-based codes and the differences between form-based and Euclidian (traditional) zoning. Part III analyzes four areas in the South that have adopted different types of form-based code: the City of Miami (SmartCode), Nashville (Urban Overlay Districts), Unincorporated Miami-Dade County (Urban Center Districts) and Gulfport Mississippi (Optional Overlay). These four municipalities represent a sample of the various methods for implementing form-based code throughout the nation. This section examines the impacts of the implementation of form-based codes on the rates of development in these areas, the resulting demographic shifts, community involvement, and community responses to the implementation of form-based codes. Part IV discusses using the Fair Housing Act as a potential legal challenge to the effects of form-based codes and potential policy solutions to increase the likelihood of meaningful community participation and to decrease the likelihood of displacement.

II. Form Based Code and New Urbanism

Zoning became prevalent in the United States after the Standard State Zoning Enabling Act (developed in 1921).¹⁸ This act was passed, in part, as a reaction to the air pollution caused by the industrial revolution and the unsuitable and dangerous living conditions that it created for residential neighborhoods adjacent to factories.¹⁹ Zoning was legitimized shortly

17. For example, see Miami21 definitions section: "By Right: A use allowed pursuant to zoning review and approval of a Building Permit or issuance of a Certificate of Use under Article 7, Section 7.1.2.1. Permitted Uses." In practice, this term means that if a developer is seeking to build in compliance with the code, the development will get approved administratively. See MIAMI, FLA., MIAMI 21 FINAL CODE art. 1, § 1.2 (Jan. 31, 2018), available at http://www.miami21.org/PDFs/Amended_Codes/Miami_21_Volume_1.pdf.

18. *Standard State Zoning Enabling Act and Standard City Planning Enabling Act*, AM. PLANNING ASSOC., <https://www.planning.org/growingsmart/enablingacts.htm> (last visited Mar. 30, 2019).

19. In the 1926 case of *Village of Euclid, Ohio v. Amber Realty Co.*, the Supreme Court described the conditions as follows:

thereafter in 1926, in the U.S. Supreme Court's ruling in *Village of Euclid, Ohio v. Amber Realty Co.*²⁰ Throughout the twentieth century, traditional (or Euclidean) zoning became widely popularized. Twenty years after *Euclid*, eighty-five percent of communities throughout the country had adopted traditional zoning regulations.²¹ The ubiquity of Euclidean zoning along with other federal, state, and local policies increased rates of urban sprawl.²²

Separating land by use meant that workplaces, recreational spaces (i.e., bars, restaurants, etc.), and residences were not located in the same zones. Because of the dearth of public transportation options available in most cities, the separation of uses created a dependence on automobiles to travel between these spaces. Such automobile dependence required an

Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed . . . which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. . . .

[T]he exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community. Some of the grounds for this conclusion are . . . aiding the health and safety of the community by excluding from residential areas the confusion and danger of fire, contagion and disorder which in greater or less degree attach to the location of stores, shops, and factories.

272 U.S. at 386–87, 391. “Operating from the premise that everything has its place, [Euclidean] zoning is the comprehensive division of a city into different use zones.” JUERGENSMEYER & ROBERTS, *supra* note 13, § 4.2, at 80 (cited in *Black’s Law Dictionary* under “Euclidean zoning”).

20. *Village of Euclid, Ohio*, 272 U.S. at 396. There, Ambler Realty alleged that the village of Euclid’s zoning regulations were an unconstitutional use of police power, but the Court found that this use of the state’s police power was necessary as cities tried to meet the challenges of a growing and increasingly industrialized society. *Id.*

21. See, e.g., Burdette, *supra* note 14.

22. David Rusk studied 213 urbanized areas and found that, between 1960 and 1990, populations increased from 95 million to 140 million (47%), while urbanized land increased from 25,000 square miles to 51,000 square miles (107%). *Debate on Theories of David Rusk*, 2 *The Regionalist* (Fall 1997). By the end of that time period, density per square mile decreased by 28%. *Id.* Data collected by the U.S. Department of Housing and Urban Development for its State of the Cities 2000 report (1994–1997 time period) show a continuation of this trend that urban areas are expanding at about twice the rate that the population is growing. U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, *THE STATE OF THE CITIES 2000*, at 63 (2000), <https://archives.hud.gov/reports/socrpt.pdf>; see also SIERRA CLUB, *STOP SPRAWL: NEW RESEARCH ON POPULATION, SUBURBAN SPRAWL AND SMART GROWTH*, <https://vault.sierraclub.org/sprawl/population/whitepaper.asp> (last visited Mar. 30, 2019) (“It is important to remember that if there are multiple causes of sprawl, then their impact is multiplied together, so that if population increases by 50%, and density decreases by 50%, land consumed will increase not by 100%, but by 300%. So poor land use makes the impact of population growth worse, and vice-versa.”).

investment in roads and highways, rather than public transportation. This choice led to negative environmental consequences and segregated residential spaces. Urban sprawl grew rapidly throughout the country with development consuming an average of two acres of American farmland per minute between 1922 and 1997²³ and increasing the number of miles driven per capita by seventy-two percent between 1969 and 1990.²⁴

As a way to address some of the negative consequences of urban sprawl, the New Urbanists formed as a movement of planners, architects, activists, developers, and environmental activists seeking to address “disinvestment in central cities, the spread of placeless sprawl, increasing separation by race and income, environmental deterioration, loss of agricultural lands and wilderness, and the erosion of society’s built heritage as one interrelated community-building challenge.”²⁵ A key tool New Urbanists developed to address these challenges was form-based codes.²⁶ Rather than zoning areas by use, form-based codes organize areas into “transect zones,” in which each zone is distinguished by the allowable amount of intensity and density as part of a transition from rural to urban.²⁷ In addition to local zoning reforms, New Urbanists seek buy-in from the federal government in promoting sustainable, mixed-use, affordable housing.²⁸

In 2003, the global planning and development firm, Duany Plater-Zyberk & Company (one of the founders of New Urbanism), developed SmartCode,²⁹ a model based on the six “prototypical American rural-to-urban . . . Transect Zones, or T-zones, for application on zoning maps.”³⁰ SmartCode outlines six ideal transect zones,³¹ including the natural zone, rural zone, suburban zone, general urban zone, urban center zone, and

23. Elizabeth Becker, *2 Acres of Farmland Lost Per Minute, Study Says*, N.Y. TIMES (Oct. 4, 2002), <https://www.nytimes.com/2002/10/04/us/2-farm-acres-lost-per-minute-study-says.html>.

24. Maurer, *supra* note 9, at 241 n.31 (2004) (citing David J. Cieslewicz, *The Environmental Impacts of Sprawl*, in URBAN SPRAWL: CAUSES, CONSEQUENCES & POLICY RESPONSES 26 (Gregory D. Squires ed., 2002)).

25. *The Charter of the New Urbanism*, *supra* note 10.

26. Peck, *supra* note 12.

27. *Tools*, CONGRESS FOR THE NEW URBANISM, <https://www.cnu.org/resources/tools> (last visited Mar. 30, 2019).

28. *The Charter of the New Urbanism*, *supra* note 10.

29. See *The Transect*, CENTER FOR APPLIED TRANSECT STUDIES, <https://transect.org/transect.html> (last visited Mar. 28, 2019).

30. See *id.*

31. “The T-zones are intended to be balanced within a neighborhood structure based on pedestrian sheds (walksheds), so that even T-3 residents may walk to different habitats, such as a main street, civic space, or agrarian land.” *Id.*

urban core.³² Each zone increases in intensity and density.³³ An increase in intensity and/or density is otherwise known as up-zoning. Many cities adopt these recommended transect zones when transitioning to form-based code.³⁴

Since its origins in the 1980s, a total of 387 form-based codes have been adopted throughout the United States, and over 300 more are in progress. As of February 2017, there were a total of 45,162,192 people and 107,966,143 acres of land affected, where the SmartCode had been adopted (14,068,221 people/93,059,407 acres), the SmartCode was in process (4,125,038 people/3,522,248 acres), the Transect Form-Based Codes had been adopted (9,385,163 people/7,016,683 acres), other types of Form-Based Codes had been adopted (17,320,510 people/4,300,639 acres), or discussions on SmartCodes or Form-Based Codes had occurred (1,071,260 people/71,051 acres).³⁵ Many of these revisions reflect the design principles outlined in SmartCode.³⁶ The codes are typically adopted as a city ordinance, usually after stakeholders³⁷ have given input in a public forum, such as a charrette.³⁸

32. Thomas Comitta Associates, Inc., *The Smart Growth Transect for Community and Economic Development*, SMART GROWTH PARTNERSHIP OF WESTMORELAND COUNTY (Sept. 9, 2010), http://www.smartgrowthpa.org/files/comitta_sgpwc_11%20x%2017%20page.pdf.

33. "Intensity" represents the amount of gross built area in a given land area, and "density" refers to the number of units in a given land area. Ann Forsyth, *Measuring Density: Working Definitions for Residential Density and Building Intensity (Design Brief No. 8)*, DESIGN CENTER FOR AMERICAN URBAN LANDSCAPE (Nov. 2003), <http://annforsyth.net/wp-content/uploads/2018/05/db9.pdf>.

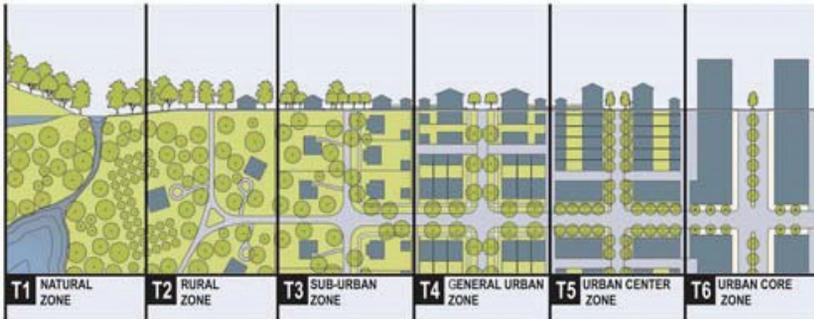
34. See *The Transect*, *supra* note 29; see also SMARTCODE VERSION 9.2, available at <https://transect.org/codes.html> (last visited Mar. 28, 2019).

35. *February 2017 Case Studies*, *supra* note 3 ("The population percentage is calculated at the time of adoption and therefore does not include any densification over time.").

36. See *id.*

37. Stakeholders usually include developers, community members, community leaders, and government officials.

38. Mary Madden & Joel Russell, *How Form-Based Codes Are Written*, PLANNERSWEB (Dec. 5, 2014), <http://plannersweb.com/2014/12/fbc4> ("Developing [the] community vision must be done early in the process, with the active involvement of those affected. One of the best models for how to do this is the community 'charrette,' which is a multi-day open public process with multiple feedback loops for the public to interact with a variety of professionals with complementary expertise in planning, urban design, architecture, transportation, law, public safety, real estate economics, and public administration. The range of professionals involved is typically determined based on the specific context and issues likely to be addressed during the community planning process. . . . A charrette process typically culminates in a place-specific 'vision plan,' which is a heavily illustrated physical plan showing the results of the discussions held at the charrette, embodying the best thinking of the involved professionals and public working together. It is much more than a policy document, showing very specifically how the public realm should be shaped, as well as the nature, location, and character of public spaces and the relationships between buildings and the streets they frame.").



SmartCode Transect Zones

Once form-based codes are adopted, cities have administrative authority to approve or reject building proposals based on whether they fit into the described specifications of that transect zone.³⁹ In other words, if a proposed building fits into the prescribed aesthetic standards for an area, the proposal will be approved administratively by staff within the city or county's zoning department.⁴⁰ Because form-based codes incorporate fewer land-use regulations and embed mass up-zoning into the code, they offer an opportunity for a wide variety of significant land use developments to be approved through the administrative process alone.⁴¹ In contrast, traditional zoning regulates intensity, density, and use. And developments that fall outside of these zoning and planning code specifications require a discretionary approval by elected or appointed officials that includes

39. Jim Little, *Pensacola Form-Based Code Proposal in Limbo After Failing to Pass CRA*, PENSACOLA NEWS J. (Oct. 12, 2018), <https://www.pnj.com/story/news/2018/10/12/pensacola-form-based-code-proposal-limbo-after-failing-pass-cra/1602388002> ("Form Based Code is a regulation, not just a guideline, adopted into city law. This type of development code provides predictable results by using physical form, rather than separation of land uses, as the principle for the code. So the developer can build a structure that meets the code, but the public no longer has much of a say in it or a way to tweak it before it's built."); Jacob Ogles, *Groups Begin Scrutinizing Sarasota Code*, SRQ DAILY (Oct. 8, 2018), <https://www.srqmagazine.com/srq-daily/2018-10-08/9293> ("Kate Lowman, a founding member of STOP!, said her great concern right now revolves around process. The Downtown plan implemented an administrative review process for certain projects meeting code requirements to be approved without public hearings. . . . I have reviewed some aspects of the development approval process, and I can see that we will be losing even more public hearings," she says. . . .Unfortunately it looks like this will take us in the wrong direction.").

40. See, e.g., MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES § 33-284.88 (Jan. 22, 2019). Administrative approval means applications for new developments are reviewed by county officials who are tasked with reviewing applications to check for compliance with the County Code. *Id.*; see also Miami, Fla., Miami21 Final Code, *supra* note 17, art. 7, § 7.1.2.1.

41. Ogles, *supra* note 39.

public notice and hearing. Consequently, community members in areas that have adopted form-based codes have expressed concerns with their potential displacement due to up-zoning and the lack of involvement in the decision-making process because of the wide-sweeping administrative authority given to cities to make decisions on how neighborhoods should look and feel without meaningful community input.⁴²

It is important to note that up-zoning is a tool and, as such, can result in displacement or in furtherance of affordable housing.⁴³ While the increase in density can be used to create more affordable housing units, density alone is not enough.⁴⁴ Policies also must be implemented to promote affordable housing development.⁴⁵ In fact, up-zoning by itself has

42. Some concerned citizens have referred to the process as “aesthetic authoritarianism by a few unelected elitists.” Charles Gallanter, *Form-Based Code: Aesthetic Authoritarianism*, NEWS & CITIZEN (Aug. 9, 2018), https://www.stowetoday.com/news_and_citizen/opinion/letters_to_the_editor/form-based-code-aesthetic-authoritarianism/article_f8165b92-9bf5-11e8-8124-8bfa846fd10e.html (last visited Mar. 13, 2019). Others are thankful when the code is not adopted because community concerns were not incorporated in the process:

“I’m so relieved,” said Nancy Cypser, trustee of the Woodland Civic Association in East Farmingdale, in response to a decision not to implement form-based code. Cypser said Monday that the consulting firm hired to use the past reports and come up with the “form-based code”—a type of zoning focused on aesthetics and an overall vision of a community—had not incorporated the negative feedback on building height and density from community meetings held in early 2017.

Denise Bonilla, *Babylon Town Abandons Plan to Rezone 109 Acres in East Farmingdale*, NEWSDAY (Oct. 9, 2018), <https://www.newsday.com/long-island/suffolk/east-farmingdale-rezoning-1.21725474>.

43. Randy Shaw, *NYC’s ‘Progressive’ Mayor Bill de Blasio Promotes Gentrification, Displacement*, BEYOND CHRON. (Sept. 7, 2017), <http://beyondchron.org/nycs-progressive-de-blasio-promotes-gentrification-displacement>.

44. “Increased density is touted as one solution to create more affordable units; yet, while the apartment building boom of recent years has added thousands of new units [in Minneapolis], most are pricey market-rate rentals. Minneapolis has lost approximately 15,000 affordable units since 2000, according to city planners [with the irony being that] [m]ost of those units still exist, but are no longer considered affordable.” Burl Gilyard, *Do the Economics of Density Really Create Affordable Housing?*, TWIN CITIES BUS. (Sept. 28, 2018), <http://tcbmag.com/news/articles/2018/october/do-the-economics-of-density-really-create-affordable-housing> (last visited Mar. 30, 2019).

45. See Aline Reynolds, *So You Want to Change Zoning to Allow for More Housing?*, NEXT CITY (Sept. 27, 2018), <https://nextcity.org/daily/entry/so-you-want-to-change-zoning-to-allow-for-more-housing> (last visited Mar. 30, 2019). Nora Liu, the northwest regional manager for the Government Alliance on Race and Equity, states: “If an area is rezoned, it needs to be done with parallel strategies to strengthen communities, so that people in the communities can thrive in place.” *Id.*; see also *Have We Zoned Great, Walkable Places out of Existence?*, FORM-BASED CODES INSTITUTE BLOG (Nov. 9, 2018), <https://formbasedcodes.org/blog/zoned-great-walkable-places-existence> (last visited Mar. 30, 2019) (“Form-based codes often result in an increase in property values, because the kinds of places

caused mass displacement,⁴⁶ and form-based codes have resulted in “displacement [of the poor] to outer fringe[s],” “increased gentrification,” and greater “social/economic segregation.”⁴⁷ This occurs because, in addition to the loss of community, when people are forced to move because they are priced-out, they are likely to move to areas that are more segregated, and, as such, they are likely to also receive less or worse municipal services and be further away from job markets and public transport.

Much of the scholarship regarding form-based codes explores its merits as an alternative to Euclidean zoning.⁴⁸ However, little has been written on their functional impact to communities and on citizens’ abilities to participate meaningfully in how their city is developed. The following case studies will examine that impact and the associated demographic trends.

III. Case Studies

By transitioning to form-based code, a municipality in a single legislative action can recharacterize the use of each parcel of land located within the area that adopted the new code and, in some areas, up-zone the density and intensity permitted. The following four case studies examine areas throughout the South that have implemented form-based codes in different ways. Miami21 closely follows the principles outlined in SmartCode.⁴⁹ Nashville has adopted its own form-based code for its downtown and created an Urban Design Overlay that can be applied to preexisting zoning districts.⁵⁰ Unincorporated Miami-Dade County has created its own form-based code that applies to specific neighborhoods rather than zoning districts.⁵¹ Gulfport follows SmartCode,⁵² with the city making the code mandatory for certain areas of the city and available as an optional

they create are both in demand and scarce. It is up to policymakers to decide how to mitigate these market forces so existing businesses and residents can remain in place as communities grow.”).

46. Renae Widdison, Jen Becker & Elena Conte, *Flawed Findings: How NYC’s Approach to Measuring Displacement Risk Fails Communities*, PRATT CENTER FOR COMMUNITY DEVELOPMENT (2018), https://prattcenter.net/sites/default/files/flawed_findings_full_report_final.pdf (last visited Mar. 13, 2019). This report concluded that New York approves major developments and up-zoning without considering the social consequences, including the displacement of residents. *Id.*

47. Kim Rolla & William M. Harris, Sr., *Zoning and Land Use: Charlottesville Community Discussion Related to Planning Futures and Citizen Impacts*, LEGAL AID JUSTICE CENTER (2017), <http://www.justice4all.org/wp-content/uploads/2017/02/Gentrification-Zoning-and-FBC.pdf> (last visited Mar. 13, 2019) (discussing the disadvantages of form-based codes on the poor).

48. Hank Savitch, *Dreams and Realities: Coping with Urban Sprawl*, 19 VA. ENVTL. L.J. 333 (2000); Burdette, *supra* note 14; Maurer, *supra* note 9.

49. See *February 2017 Case Studies*, *supra* note 3.

50. *Id.*

51. See discussion *infra* Section III.C.

52. See *February 2017 Case Studies*, *supra* note 3.

overlay in other parts. These case studies do not represent the complete set of the ways form-based code can be adopted, but they illustrate some of the variations and the associated effects on participatory mechanisms and displacement.

A. Miami, Florida: Miami21

i. The Code and Its Adoption

Miami21 is currently heralded as the magnum opus of form-based codes.⁵³ Using the principles outlined in *SmartCode*, the sprawling City of Miami implemented form-based code in 2009 throughout the entire city.⁵⁴ Prior to the adoption of Miami21, zoning in Miami was considered to be a “hodge-podge” of incompatible buildings and uses,⁵⁵ and Miami21 was viewed as much needed reform that would make Miami’s aesthetic more consistent and predictable.⁵⁶

Beginning in 2005, the city held “60 formal public hearings on the new code, in addition to another 500 meetings with residents and other stakeholders—ranging from events with hundreds of attendees in large downtown convention halls to intimate sit-downs in residents’ living rooms.”⁵⁷ In these conversations, developers and city officials often cited the opportunities that Miami21 would provide for affordable housing developments.⁵⁸ Ultimately, Miami21 was approved in 2009 at the end of Mayor Manny Diaz’s term.⁵⁹

Although Miami21 was approved in 2009, the economic crash resulted in a dramatic halt of property development, diverting attention away from zoning laws.⁶⁰ It was not until about 2013 that developers had sufficient

53. *Miami21*, FORM-BASED CODES INSTITUTE, <http://formbasedcodes.org/codes/miami-21> (last visited Jan. 23, 2019); Press Release: City of Miami Receives National Award for Pioneering Zoning Reform, City of Miami Planning & Zoning Department (Jan. 11, 2011), http://www.miami21.org/Media_01112011.asp.

54. MIAMI, FLA., MIAMI 21 FINAL CODE, *supra* note 17.

55. *Miami’s Zoning History*, City of Miami Planning & Zoning Dep’t, Miami21: Your City, Your Plan, http://www.miami21.org/Miami_Zoning_History.asp (last visited Feb. 1, 2019).

56. Miami 21, DPZ & Co., <https://www.dpz.com/Projects/0425> (last visited Mar. 30, 2019).

57. *Miami21 Public Meetings*, City of Miami Planning & Zoning Dep’t, Miami21: Your City, Your Plan, http://www.miami21.org/Public_Meetings_ZoningCode.asp (last visited Feb. 1, 2019). Notably, many of these meetings were in Spanish. *Id.*

58. *Planning Report: Plan Would Reward Developers That Build Affordable Housing in Miami*, City of Miami Planning & Zoning Dep’t, Miami21 : Your City, Your Plan (Aug. 7, 2007), http://www.miami21.org/Media_070817.asp (last visited Mar. 14, 2019).

59. Zach Patton, *The Miami Method for Zoning: Consistency over Chaos*, *Governing* (May 2016), <http://www.governing.com/topics/urban/gov-miami-zoning-laws.html>.

60. *Id.* After Miami21 was approved on October 22, 2009, “came the Great Recession. Ironically, it may have been the best thing that could have happened to Miami 21. Development in South Florida ground to a halt, and city leaders were overwhelmed by

Miami21 is also unique because it leaves a special carve-out for something known as Special Area Plans, which do not conform with form-based codes or any code at all.⁶⁴ The official purpose of a Special Area Plan (SAP) is to “encourage the assembly and master planning of parcels” that are greater than nine acres and to promote “greater integration of public improvements and infrastructure” and to “provide high quality design elements” by incentivizing developers to utilize more than nine acres of land with very little to no zoning regulations.⁶⁵ In a *quid pro quo*, the government forgoes its normal zoning laws in exchange for a developer’s investment in the development of land within the city limits. While SAPs are not form-based codes, they are relevant because, similar to the process that follows once up-zoning gets adopted as part of a transition to form-based code, when an SAP is approved through a legislative process at the city level, no more opportunity exists for public input on developments or zoning changes within the SAP. The city has made that trade-off on behalf of residents with the hopes that development will be beneficial to the community that is directly affected,⁶⁶ but residents have expressed concerns over the lack of community input in the process.⁶⁷ SAPs have led to large scale luxury developments in affluent areas, like Brickell City Centre.⁶⁸ However, it has also led developers to seek out SAPs in minority neighborhoods abutting the Downtown Miami area to take advantage of the lack of regulatory control, such as the proposed Magic City SAP and the proposed Eastside Ridge SAP in Little Haiti.⁶⁹ The mass up-zoning that typically accompanies an SAP being granted has the potential to displace long term low-income residents.⁷⁰

64. *Id.* art. 3, § 3.9.1.

65. *Id.*

66. Although critics of SAPs have raised concerns regarding the lack of community involvement in the SAP process, City of Miami Planning & Zoning Director Francisco Garcia “insist[ed] that community input is a central tenant of SAPs.” David Smiley & Andres Viglucchi, *Redesigning Miami, 9 Acres at a Time*, MIAMI HERALD (Jan. 13, 2017), <https://www.miamiherald.com/news/local/community/miami-dade/article126501109.html>. Additionally, in response to concerns regarding how SAPs affect local communities, Miami 21 designers “note[d] that developers, even without SAPs, could always pursue up-zoning without providing anything in return to the community.” *Id.*

67. For example, in response to the SAPs being proposed in Little Haiti, Marleine Bastien, a local Haitian-American activist said: “The more we learn about these mammoth projects, the more concerned we are What we resent is for us to be brought in at the 11th hour when everything is cooked and ready to eat, and we get the crumbs.” *Id.*

68. *About Us*, BRICKELL CITY CENTER, <https://www.brickellcitycentre.com/about-us/overview> (last visited Feb. 1, 2019).

69. Brian Bandell, *Developer Seeks Approval for 5.4m Sq. Foot Project in Miami’s Little Haiti*, SOUTH FLA. BUS. J. (June 19, 2018), <https://www.bizjournals.com/southflorida/news/2018/06/19/developer-seeks-approval-for-5-4m-square-foot.html>.

70. In response to the proposed Eastridge SAP in Little Haiti, Elie Philippe, a local resident stated “I’m afraid we’re going to lose all the Haitians in Little Haiti. Like, Little

Given the increase in rates of developments being built as a matter of right (in compliance with Miami21), the carve-outs where no notice or hearing is required, and the sharp reduction in the amount of public hearings held since form-based code was implemented (discussed *infra*), Miami21 seems to have curtailed traditional avenues for public participation in the zoning process.

ii. Effects and Implementation

Rather than alleviate a chronic housing shortage for vulnerable communities with affordable housing developments, the up-zoning has brought an influx of high-rise luxury buildings,⁷¹ which many fear will displace long-term residents, primarily low-income communities of color. Development is commonplace in the City of Miami. City of Miami Planning and Zoning Director Francisco Garcia, one of the authors of Miami21, explained, “In Miami, I don’t think there is any area that is not undergoing some degree of change or redevelopment, or thinking about redevelopment. . . . This is our world today here in Miami.”⁷² From 2000 to 2016, downtown Miami saw a 150% population increase⁷³ and, from 2010 to 2018, downtown Miami saw a 38.1% population increase.⁷⁴ Since development in the area started with luxury condominiums, many of the new units in downtown Miami have effectively priced out a large segment of the population.⁷⁵ As of March 2018, there were more than 500 luxury condominiums, with an asking price of over \$1 million USD, formally listed for sale in the greater downtown Miami area.⁷⁶ Recently, there has been more studio apartment development,⁷⁷ meaning fewer families are able to access units in the area. In fact, Miami-Dade County’s housing market is one of the country’s least

Haiti is going to become a place where they have Haitian things, but no Haitian people.” Laura Rodriguez & Brandon Lopez, *Mega Developer Wants to Build in Little Haiti*, NBC MIAMI (June 20, 2019), <https://www.nbcmiami.com/news/local/Mega-Developer-Wants-to-Build-in-Little-Haiti-486087901.html>.

71. Natalie Delgadillo, *Downtown as a Template for Miami’s Future*, CITY LAB (Oct. 23, 2016), <https://www.citylab.com/transportation/2016/10/downtown-miami-future-walkability-development>.

72. Smiley & Viglucci, *supra* note 66.

73. Delgadillo, *supra* note 71.

74. 2018 Greater Downtown Miami Demographics Report, MIAMI DOWNTOWN DEVELOPMENT AUTHORITY at 2, http://www.miamidda.com/wp-content/uploads/MDDA_DemoPopReport_05072018.pdf.

75. Delgadillo, *supra* note 71.

76. *Nearly 78 Months of Luxury Condo Supply Listed for Sale in Greater Downtown Miami*, CRANESPOTTERS.COM (Mar. 6, 2018), <https://cranespotters.com/PreconstructionNews/Details/40309?pagename=Nearly%2078%20Months%20Of%20Luxury%20Condo%20Supply%20Listed%20For%20Sale%20In%20Greater%20Downtown%20Miami>.

77. Rene Rodriguez, *How Small Can You Go? These New Miami Apartments Want You to Downsize and Live Large*, MIAMI HERALD (Apr. 23, 2013), <https://www.miamiherald.com/news/business/real-estate-news/article208563364.html>.

affordable, and recent studies have shown that the City of Miami is one of the hardest cities for renting, and it takes “much-higher-than-average incomes to afford a place in the downtown corridor.”⁷⁸

c. Public Participation and Community Response

In addition to the increased likelihood of displacement of communities of color, concerns exist related to what mechanisms are in place for citizens to voice their complaints under Miami21. For example, since Coconut Grove was annexed to the City of Miami in 1925, it is subject to the changes that were made when the City of Miami adopted Miami21.⁷⁹ The proposal for a large development in the West Grove community of Coconut Grove, one of the oldest neighborhoods in the City of Miami, exemplifies Miami21’s effect on notice to the community and potential for community input. This former Jim Crow neighborhood is comprised mainly of African-American and Afro-Bahamian communities.⁸⁰ In November 2018, the West Grove community read in a local newspaper article that a Chicago developer had signed a \$25 million contract to purchase some fifteen lots along Grand Avenue, the main street in the heart of the historic, low-income Black neighborhood.⁸¹ The plan, as presented, was to build “a hotel, offices, a micro-unit apartment house, a mix of affordable and ‘deluxe’ rental apartments and shops,” and a roof of one of the buildings “would be designed to accommodate drones capable of ferrying people.”⁸² The buildings were to be five stories tall, the maximum height permitted by Miami21 for the area.⁸³ According to information shared at a community meeting in the West Grove, the closing for the acquisition of land was set to occur in mid-February 2019,⁸⁴ but did not take place as planned.

The West Grove community found out about this potential three-city-block development that would displace at least seventy families through

78. Nancy Dahlberg, *Millennials Migrate to Downtown Miami in Drove and Business Follow*, MIAMI HERALD (Sept. 27, 2016), <https://www.miamiherald.com/news/business/article104311866.html>.

79. Grant Livingston, *The Annexation of the City of Coconut Grove*, 60 *TEQUESTA: J. HIST. ASS’N S. FLA.* 32 (2000).

80. Roshan Nebhrajani, *The Early Bahamian History of Coconut Grove*, *NEW TROPIC* (May 9, 2016). The West Grove, marked as “D9” with a circle, on a 1937 redlining map of Greater Miami by the Home Owners’ Loan Corporation is designated as “hazardous.” *Mapping Inequality Redlining in New Deal America*, UNIV. OF RICHMOND DIGITAL SCHOLARSHIP LAB, <https://dsl.richmond.edu/panorama/redlining/#loc=12/25.8080/-80.2085&opacity=0.8&city=miami-fl> (last visited Mar. 30, 2019).

81. Andres Viglucchi, *Will This Plan Save the West Grove? A Developer Has Big Plans for Grand Avenue*, MIAMI HERALD (Nov. 26, 2018), <https://www.miamiherald.com/news/local/community/miami-dade/coconut-grove/article222032010.html>.

82. *Id.*

83. *Id.*

84. Commissioner Ken Russell, Coconut Grove Ministerial Alliance Monthly Community Meeting, Community Remarks (Dec. 1, 2018) (notes on file with authors).

the article in *The Miami Herald*.⁸⁵ As soon as they saw the news, they began calling City Commissioner Ken Russell to find out why they had not been notified of the impending development. They also wanted to confirm that the community would get an opportunity to negotiate a community benefits agreement guaranteeing affordable housing units and establishing a local hiring preference for the anticipated retail stores.⁸⁶

At a community meeting on December 1, 2018, Commissioner Ken Russell explained that, although the sale had not gone through yet, if the developers proceeded to buy the properties and build in compliance with Miami21, they would be building “as a matter of right,” and, as such, the City of Miami did “not have a seat at the table” regarding the development, and thus could not negotiate for a community benefits agreement.⁸⁷ As of mid-March 2019, the community has not received additional information about any future development plans.⁸⁸ Accordingly, it is possible the sale was not successful and the prior owners remain in possession of these properties.

When up-zoning gets imbedded into the zoning code, as was the case with the properties on Grand Avenue, the community loses the leverage that they would have had if the developer needed to get a discretionary land use permit in order to build. Without this leverage, it is very difficult for the community to negotiate with the developers for community benefits because the developer does not need the community’s support to build in accordance with the code.

B. Downtown Nashville, Tennessee: Urban Overlay

i. The Code and Its Adoption

Nashville did not adopt SmartCode for the entire city. Instead, in 2015, Nashville adopted its form-based code as an “urban overlay” to the existing zoning code in Downtown Nashville only.⁸⁹ However, this urban overlay uses the transect model and applies six different transect zones to the Downtown Nashville area.⁹⁰

85. *Id.*

86. *Id.* For general information on community benefits agreements, see *Community Benefits 101*, PARTNERSHIP FOR WORKING FAMILIES, <http://www.forworkingfamilies.org/page/community-benefits-101> (last visited Mar. 30, 2019).

87. See Commissioner Russell, *supra* note 84.

88. St. Paul Community Development Corporation Housing Committee meeting (Mar. 11, 2019) (notes on file with authors).

89. *What Is an Urban Design Overlay?* METRO. GOV’T OF NASHVILLE & DAVIDSON COUNTY, TENN., <https://www.nashville.gov/Planning-Department/Rezoning-Subdivision/Urban-Design-Overlay.aspx> (last visited Mar. 28, 2019).

90. *Nashville Next: A General Plan for Nashville and Davidson County, Volume III: Community Plans*, METRO. PLANNING COMM’N OF NASHVILLE & DAVIDSON COUNTY, TENN. (amended Aug. 24, 2017), https://www.nashville.gov/Portals/0/SiteContent/Planning/docs/CommPlans2017/next-vol3-Downtown_Amended2017.pdf.

The Metropolitan Planning Commission of Nashville and Davidson County adopted NashvilleNext after “holding over 420 public meetings . . . engaging over 18,500 participants in providing public input to the general plan.”⁹¹ NashvilleNext outlined the city’s plan for growth over the next twenty-five years, expanding on some of the form-based codes the city had adopted as early as 2005.

The city considered NashvilleNext as a way to articulate a vision for Nashville’s growth that can be adopted into the code, one neighborhood at a time.⁹² Thus, NashvilleNext is viewed as a series of recommendations for Nashville’s growth that developers and government officials can choose to opt into, but that is not legally enforceable.

Nashville’s approach to zoning combines “Specific Plan Districts” or “SP,” zoning, which “refers to a new type of form-based zoning district, not an overlay, which is not subject to the traditional zoning districts’ development standards.”⁹³ Along with the Specific Plan Districts, Nashville utilizes overlays, including the Urban Design Overlay, the Institutional Overlay, and the Contextual Overlay District.⁹⁴ The Urban Design Overlay (UDO) “defines a specific area and sets design standards for its development” and is form-based, rather than traditional zoning.⁹⁵

Effectively this scheme means that only certain districts of Nashville are actually form-based.⁹⁶ For an area or neighborhood to adopt a UDO (i.e., a form-based code), “a council member can request that Metro Planning create a UDO,” or a developer can make an application.⁹⁷ Nashville prioritizes UDO requests that are linked to a Detailed Neighborhood Design Plan (“DNNDP, because the UDO will translate the community’s vision of the future articulated in the DNNDP “from planning policy into zoning code with regulatory power.”⁹⁸

91. *Id.* at 3.

92. *Id.*

93. *Zoning & Subdivision*, Planning Dep’t, METRO. GOV’T OF NASHVILLE & DAVIDSON COUNTY, TENN., <https://www.nashville.gov/Planning-Department/Rezoning-Subdivision.aspx> (last visited Mar. 28, 2019).

94. *Id.* While an Urban Design Overlay is more reflective of zoning that would be seen in a T5 or T6 zone under SmartCode, a Contextual Overlay District applies design standards to “reinforce established . . . character of residential development in a particular area” *Contextual Overlays*, METRO. GOV’T OF NASHVILLE & DAVIDSON COUNTY, TENN., <https://www.nashville.gov/Planning-Department/Rezoning-Subdivision/Contextual-Overlays.aspx> (last visited Mar. 28, 2019); Institutional overlays apply to colleges and universities in the Nashville Area, *Institutional Overlays*, METRO. GOV’T OF NASHVILLE & DAVIDSON COUNTY, TENN., *supra*.

95. *Id.*

96. *Nashville Next: A General Plan*, *supra* note 90.

97. *What Is an Urban Design Overlay?*, *supra* note 89.

98. *Id.*

Since a UDO request is a zone change, it must follow the zone change procedure which includes:

- Submission to Metro Planning for review,
- Review and recommendation by Metro Planning staff,
- Public hearing at Metro Planning Commission,
- Metro Planning Commission recommendation to Metro Council,
- Three readings (including public hearing on second reading) at Metro Council, and
- Metro Council approval of the UDO.⁹⁹

However, it is not a requirement that developers applying for a UDO follow any of the recommendations outlined in the DNNDP.¹⁰⁰ Requesting a variance within a UDO requires the same procedure.¹⁰¹ This means that even though community stakeholders articulated a plan for their neighborhood, a developer can request a zoning change that does not actually reflect a DNNDP.¹⁰² Although the process is the same under form-based code, because the area has been up-zoned and multiple uses are permitted, developers do not have to request as many variances, presumably because the desired building already fits within the specifications of the code.

This process represents an opportunity for the community to be involved in the design process in a non-enforceable way.¹⁰³ The DNNDPs as well as Community Plans which involved community input, outline a vision for a neighborhood that reflects the particular character, landmarks, and needs

99. *Id.*

100. *Id.* "Metro Planning prioritizes UDOs that are linked to DNNDPs, because the DNNDP process involves the community in envisioning its future." However, the link is not required. *Id.*; see also *The Rezoning Process in Nashville/Davidson County*, METRO. GOV'T OF NASHVILLE & DAVIDSON COUNTY, TENN., <https://www.nashville.gov/Portals/0/SiteContent/Planning/docs/zoning/ZoningProcessChart.pdf> (last visited Mar. 28, 2019).

101. *Id.*

102. *Id.*; Nashville also has "Community Plans" that are memorialized in Nashville Next and are opportunities for community members and stakeholders to gather to outline their plans and visions for their neighborhood or community, these plans can be codified by going through the zoning change process, including requesting a UDO, see *Community Plans*, METRO. GOV'T OF NASHVILLE & DAVIDSON COUNTY, TENN., <https://www.nashville.gov/Planning-Department/Community-Planning-Design/Community-Plans.aspx> (last visited Mar. 28, 2019).

103. *What Is an Urban Design Overlay?*, *supra* note 89; see also *Community Plans*, *supra* note 102, for alternative ways for community members to get involved in the neighborhood planning process. However, it is important to note that neither Community Plans nor DNNDPs are directly tied to developing the zoning code. Zoning changes still require the standard legislative process to be adopted. DNNDPs and Community Plans are unenforceable on their own.

of a neighborhood, but does not actually create enforceable code. As Nashville's Metro Planning outlines on its website that it "prioritizes" UDOs "linked to DNDPs" (i.e., codes that reflect the design principles and zoning suggestions drawn up in the DNDP), it does not require, but bends toward design concepts that incorporate community input.¹⁰⁴

ii. Effects and Implementation

Downtown Nashville, which has been the epicenter of form-based code and development in Nashville, has not always been a residential area characterized by economic growth.¹⁰⁵ Traditionally, mostly Blacks lived in Downtown Nashville. And during the Jim Crow period, all of the downtown area was redlined, meaning federal mortgage lenders would not provide home loans in the area.¹⁰⁶

Much of the downtown area's development now has been comprised of luxury condos, hotels, and office space.¹⁰⁷ The most notable construction has been the sixteen-acre Nashville Yard development, which will serve as a future home to Amazon.¹⁰⁸ Of the over 3,000 rental units and condos that have been built in Downtown Nashville, only fifty-four (less than two percent) are deemed affordable for "median income" families.¹⁰⁹ There are about 100 times as many hotel rooms that have been built as compared to affordable rental units.¹¹⁰ According to Rick Bernhardt, the former director of the Metropolitan Planning Commission of Nashville and Davidson County, areas of Nashville under form-based zoning increased 113% in taxable property value from 2005 to 2013, compared with just 33% countywide.¹¹¹

Two-thirds of the people living in Downtown Nashville are white-collar workers, representing a significant shift from the demographics of

104. *Id.*

105. Garrett Harper, *Economic Development*, NASHVILLE AREA CHAMBER OF COMMERCE (Mar. 2013), <https://www.nashville.gov/Portals/0/SiteContent/Planning/docs/NashvilleNext/ECD%20background%20reportforonline%20posting.pdf>.

106. Robert K. Nelson, LaDale Winling, Richard Marciano, Nathan Connolly, et al., *Mapping Inequality*, AMERICAN PANORAMA, Robert K. Nelson & Edward L. Ayers ed.), <https://dsl.richmond.edu/panorama/redlining/#loc=4/36.71/-96.93&opacity=0.8> (last visited Mar. 28, 2019).

107. Development Tracker, NASHVILLE PLANNING DEPARTMENT, <https://maps.nashville.gov/DevelopmentTracker> (last visited Mar. 28, 2019).

108. Sandy Mazza, *3 Things to Know About Amazon's Future Home: Nashville Yards*, TENNESSEAN (Nov. 14, 2018), <https://www.tennessean.com/story/money/2018/11/14/nashville-yards-amazon-downtown-development/1990369002> (last visited Mar. 13, 2019).

109. Development Tracker, *supra* note 107.

110. *Id.*

111. Sean Tubes, *Planner Describes How "Form-Based" Zoning Changed Nashville*, CHARLOTTESVILLE TOMORROW (Sept. 21, 2016), <https://www.cvilletomorrow.org/articles/nashville-planner-on-form-based-zoning>.

Downtown Nashville in the 1990s and early 2000s.¹¹² The pockets of Downtown Nashville where luxury residences have been developed are now White, but the area as a whole remains mostly Black, with White residents living in the suburbs. Notably, despite twenty-one buildings developed in 2018 in Downtown Nashville that had an investment amount of over \$2.5 million USD¹¹³ (including an office building, eleven hotels, three apartment complexes with over one hundred units, building expansions, a storage facility, and a museum), there were *zero* public hearings related to new developments in Downtown Nashville in all of 2018.¹¹⁴

C. Unincorporated Miami-Dade County, Florida: Urban Center Districts

i. The Code and Its Adoption

Urban Center and Urban Area Districts (UCDs)¹¹⁵ are uniquely zoned areas throughout unincorporated Miami-Dade County situated near transit corridors.¹¹⁶ UCDs are form-based codes that follow the transect model outlined in SmartCode, with some variations to conform to the natural landscape and existing infrastructure.¹¹⁷ UCDs were chosen as part of a directive of the county's Comprehensive Development Master Plan¹¹⁸ (CDMP) to pro-

112. See Harper, *supra* note 105; *Downtown Nashville Demographics*, POINT2HOMES, <https://www.point2homes.com/us/Neighborhood/TN/Downtown-Nashville-demographics.html> (last visited Mar. 30, 2019).

113. Development Tour, DOWNTOWN NASHVILLE PARTNERSHIP, <https://www.nashville.downtown.com/business/development-map> (last visited Jan. 30, 2019).

114. *Id.*

115. There are currently thirteen UCDs: Downtown Kendall (adopted 1999), Naranja Community Urban Center District (adopted 2006), Cutler Ridge Metropolitan Urban Center District (adopted 2006), Goulds Community Urban Center District (adopted 2006), Ojus Urban Area District (adopted 2006), Perrine Community Urban Center District (adopted 2006), Princeton Community Urban Center District (adopted 2006), Leisure City Community Urban Center District (adopted 2007), Model City Urban Center District (adopted 2010), North Central Urban Area District (adopted 2011), Bird Road Corridor Urban Area District (adopted 2013), Palmer Lake Metropolitan Urban Center District (adopted 2013), and Country Club Urban Center District (adopted 2014). MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES ch. 33, arts. XXXIII(I)–(V) (Jan. 22, 2019); see also *Zoning Districts*, Regulatory & Economic Resources, MIAMI-DADE.GOV, <http://www.miamidade.gov/zoning/districts.asp> (last visited Mar. 30, 2019).

116. Urban Centers, *Land Use Element of Comprehensive Development Master Plan*, MIAMI-DADE COUNTY, I-46 (2008), available at <http://www.miamidade.gov/planning/cdmp/plan/cdmp-land-use-element.pdf>.

117. MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES ch. 33, art. XXXIII(K) (Jan. 22, 2019); see also Standard Urban Center District Regulations, Miami-Dade, FLA. CODE, ch. 33, art. XXXIII(K) (revised Mar. 2019), <https://www.miamidade.gov/zoning/library/reports/standard-urban.pdf>.

118. DEP'T OF REGULATORY & ECON. RES., at I-45 to I-48, <https://www.miamidade.gov/planning/library/reports/planning-documents/cdmp/land-use.pdf> (last visited Mar. 30, 2019).

mote urban centers in places where mass transit, roadways, and highways are highly accessible.¹¹⁹ They are “designated by the county’s Comprehensive Plan to develop over time into multi-use districts characterized by high quality urban design.”¹²⁰

With the County’s adoption of Article XXXIII(K) of Chapter 33 of the Miami-Dade Code in July 2005, the County transitioned from zoning UCDs with traditional (Euclidean) zoning maps to zoning these areas using form-based code.¹²¹ The master plans for the various UCDs use form-based codes and are regulated by the subchapters of Article 33 of the Miami-Dade County Code.¹²² As part of the change to form-based code, the areas of unincorporated Miami-Dade County that are now designated as UCDs were rezoned from individual parcels of land zoned by specific, demarcated uses, such as RU-1—Single-Family Residential District, to larger, contiguous areas of land with broad use categories, such as Core.¹²³

Inside UCDs, areas are labeled as “Core,” “Center,” or “Edge” sub-districts.¹²⁴ These sub-districts regulate the allowable intensity and density.¹²⁵ Mixed-use developments are encouraged in the core and center sub-districts, while edge sub-districts have largely been reserved for residential development.¹²⁶

Section 33-284.88 of the Miami-Dade Code states that all developments in UCDs, besides single-family homes and duplexes, “shall be processed and approved administratively.”¹²⁷ After an applicant submits a proposal, it will be reviewed by the Department of Regulatory and Economic

119. *Id.*; MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES § 33-284.81 (Jan. 22, 2019).

120. Standard Urban Center District Regulations, *supra* note 117 (“About This Document” reference).

121. *Id.* The City of Miami also transitioned to form-based code in 2009 with the adoption of Miami21. *Project Vision*, MIAMI 21, <http://www.miami21.org>, (last visited Mar. 30, 2019); *see also supra* Section III.B.a. UCDs and the City of Miami are currently the only areas of Miami-Dade County that utilize form-based code.

122. MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES ch. 33, art. XXXIII(I)–(V).

123. *See, e.g.*, Hearing No. 14-7-CC-1 (13-92) regarding Zoning Application Case No. Z2013000092/N (*Bird Road Corridor Urban Area District*), BD. COUNTY COMMISSIONERS, http://pzimage.miamidade.gov/images/new_documents/Z2013000092/N.pdf (last visited Mar. 30, 2019) (representing the prior zoning categories of the area); *see also* Bird Road Corridor Urban Area District, Miami Dade, FLA. CODE, ch. 33, art. XXXIII(U), <https://www.miamidade.gov/planning/library/ordinances/bird-corridor-district-regulations.pdf> (last visited Mar. 30, 2019) (describing the new zoning guidelines).

124. *See* MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES § 33-284.81 (describing the standard purpose and applicability of Urban Center District Regulations).

125. *See* discussion *supra* note 33 (defining “intensity” and “density”).

126. Standard Urban Center District Regulations, *supra* note 117, at 1.

127. MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES § 33-284.88. Administrative approval means applications for new developments are reviewed by county officials who are tasked with reviewing applications to check for compliance with the County Code. *Id.* Because of their low-density and low overall impact, single-family homes and duplexes

Resources, which will issue a decision in twenty-one days.¹²⁸ Other departments such as the Department of Public Works and Waste Management, Miami-Dade Fire Rescue Department, and the Miami-Dade County School Board to assess potential impacts on infrastructure and services, in which case mitigation measures may be requested.¹²⁹ Besides these administrative review procedures, developments that are consistent with the UCD zoning plan are not required to provide notice to residents or be subject to any public hearing.¹³⁰ However, any developments that are inconsistent with the area's transect description are subject to the same procedures, including notice and hearing, that a request for a map variance would require in an area outside a UCD that does not follow form-based code.¹³¹

ii. Effects and Implementation

Similar to the other municipalities that have transitioned to form-based zoning, re-characterizing areas in unincorporated Miami-Dade County as urban mixed-used spaces with higher density, intensity, and floor-heights has the potential to displace the long-time residents of these areas.¹³² Areas that are zoned as high-density and mixed-use with proximity to mass transit are very attractive to developers, especially as the population of Miami-Dade County continues to grow.

Only one UCD, Model City, includes a mandatory inclusionary zoning provision.¹³³ This requires all developments with more than four residential units to provide a minimum of either 12.5 percent workforce housing or ten percent as affordable housing.¹³⁴ In UCDs without mandatory inclusionary zoning provisions, and/or other similar legislative protections, zoning changes make it possible for developers to build large-scale residential complexes without any affordable units.

Moreover, there is also the potential for significant displacement even where mandatory inclusionary zoning provisions exist, because of the

that are in compliance with the Code do not have to see administrative approval before construction. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* Applications and the departments' responses are available at Miami Dade Zoning, MIAMI-DADE COUNTY, https://energov.miamidade.gov/EnerGov_Prod/SelfService#/search (last visited Mar. 30, 2019).

131. See generally MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES, ch. 33.

132. For more information on displacement of historically Black communities in other parts of the County, see David Smiley, *Evictions, Profit, and Slum: The Slow Fade of Grand Avenue*, MIAMI HERALD (Dec. 2, 2016), <http://www.miamiherald.com/news/local/community/miami-dade/article118514978.html>; Andres Viglucci, *There's a Bit of Wynwood Developers Haven't Touched: Will They Gentrify That Too?*, MIAMI HERALD (Nov. 17, 2017), <http://www.miamiherald.com/news/local/community/miami-dade/midtown/article185212378.html>.

133. MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES § 33-284.99.42(c)(1).

134. *Id.*

inadequacy of these provisions. For example, the Model City UCD requirement of 12.5 percent workforce or ten percent affordable housing,¹³⁵ does not guarantee enough affordable housing units for all low-income residents currently living in the Model City UCD where there is a poverty rate of 42.9 percent.¹³⁶ Additionally, an affordable housing unit is defined as a household “whose income range is up to 80 percent of the most recent median family income for the County,”¹³⁷ a figure which is out of reach for the “estimated 75.6 percent of households [in Liberty City that] have annual incomes of less than \$40,000, and [even more out of reach for the] 46.2 percent of households [that] earn less than \$20,000 annually, far below the County’s median household income of \$43,099.”¹³⁸

iii. Public Participation and Community Response

Although not mandated by statute, residents in UCDs were asked to participate in a process called “charrettes,” which ultimately led to the design of UCDs.¹³⁹ Charrettes were a series of stakeholder meetings where residents and other stakeholders,¹⁴⁰ including developers, could outline

135. *Id.*

136. *Id.*; Edward Murray, *Liberty City: Economic Analysis and Opportunities Report*, South Florida Housing Consortium 27 (Feb. 2, 2017), available at https://civic.miami.edu/_assets/pdf/housing-initiatives/housing-reports/Liberty-City-Economic-Analysis-and-Opportunities-Report-2017-2-2-Final.pdf. Model City is another name for Liberty City.

137. MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES § 33-284.99.42 (“Affordable housing unit’ means a dwelling unit, the sale, rental, or pricing of which is restricted to households whose income range is up to 80 percent of the most recent median family income for the County reported by the U.S. HUD and maintained by the Department of Planning and Zoning.”).

138. See Murray, *supra* note 136, at 27 (“Significantly, the poverty rate in Liberty City is 42.9 percent, which is more than double the overall poverty rate (20.5 percent) for Miami-Dade County.”).

139. Miami-Dade County Dep’t of Planning & Zoning, *Charrette Area Plans Urban Centers*, S. FLA. REG’L PLANNING COUNCIL, <http://www.sfrpc.com/ftp/pub/watershed/12Jan06%20Exhibit%20C.pdf> (last visited Mar. 30, 2019).

140. Charrettes invite stakeholders, such as developers, and community members, to participate in the planning process. To see who participated in some charrettes and what was discussed, see *Model City/Brownsville Charrette Area Plan Report Executive Summary*, Miami-Dade County Dep’t of Planning & Zoning, Community Planning Section (Sept. 2003), <https://www.miamidade.gov/zoning/library/reports/model-city-executive-summary.pdf> (last visited Mar. 30, 2019); *Goulds Community Urban Center, Citizens’ Master Plan Final Report*, Miami-Dade County Dep’t of Planning & Zoning (July 23, 2003), <http://miamidadetpo.org/library/studies/goulds-community-urban-center-citizens-master-plan-final-report-2003-07.pdf>; *Goulds Charrette Area Plan Report Executive Summary*, Miami Dade County Dep’t of Planning & Zoning, Community Planning Section (2003), <https://www.miamidade.gov/zoning/library/reports/goulds-executive-summary.pdf>; *Perrine Charrette Area Plan Report Executive Summary*, Miami-Dade County Dep’t of Planning & Zoning, Community Planning Section (Jan. 2003),

initiatives and the types of development that they wanted in the community.¹⁴¹ However, the Code does not require these initiatives to be followed, and the County does not have a system in place to enforce the designs and recommendations that the stakeholders produced at these meetings for the UCDS; they rather are used to “develop the community’s vision for its growth and future development.”¹⁴² Each enforceable ordinance adopted the zoning and land-use descriptions created through the charrettes, but, with the exception of Model City that included a mandatory inclusionary zoning provision, the social benefits discussed at the charrettes were not included.¹⁴³ Notably, the Model City/Brownsville Charrette was led by the Model City Office of Community and Economic Development (OCED) Community Advisory Committee, which adopted the following process:

The study itself has been funded with HUD CDBG funds and was intended to develop a coordinated Area Plan for Model City/Brownsville’s revitalization. OCED will then be able to concentrate improvement efforts in those areas by *providing the community development programs that will benefit the residents. . . .*

. . . .

. . . Once a Charrette Area Plan is accepted by the local community, it is presented to the Community Council, Planning Advisory Board and finally to the Board of County Commissioners for acceptance of the report and to direct County staff to prepare the necessary code amendments to implement the

<https://www.miamidade.gov/zoning/library/reports/perrine-executive-summary.pdf> (last visited Mar. 30, 2019); *North Central Charrette Area Plan Report Executive Summary*, Miami-Dade County Dep’t of Planning & Zoning, Community Planning Section (Sept. 2003), <https://www.miamidade.gov/zoning/library/reports/north-central-executive-summary.pdf>.

141. Charrette Master Plans are detailed documents for each UCD that include renderings and development proposals. *See, e.g., supra* note 140.

142. *Small Area Studies*, Miami-Dade Dep’t of Regulatory & Econ. Resources, <https://www.miamidade.gov/zoning/small-area-studies.asp> (last visited Mar. 30, 2019).

143. *See, e.g., North Central Charrette Area Plan Report Executive Summary, supra* note 140. North Central’s charrette discussed the inclusion of affordable housing; however, Model City is the only UCD with a mandatory inclusionary zoning provision. Even in Model City, where the County staff prepared the necessary Code amendments for the creation of UCDS, the UCD Code, on the whole, did not address the implementation of citizen requests from the charrette such as “improv[ing] the public infrastructure: landscaping, parks, schools, sidewalks, street lights, water and sewer service.” *Model City/Brownsville Charrette Area Plan Report Executive Summary, supra* note 140. To view examples of charrette reports and corresponding regulations, see *Small Area Plans & Ordinances*, Miami-Dade Dep’t of Regulatory & Econ. Resources, <https://www.miamidade.gov/zoning/small-area-plans.asp> (last visited Mar. 30, 2019).

recommendations that require legislative action as well as finalize the Area Planning Process.¹⁴⁴

A comparison between the level of community participation in Model City (which required the charrette area plan to be accepted by the community) to the more traditional charrette process, such as the North Central Charrette, is a good example of the varying degrees of community involvement in charrettes. Over the course of a week in North Central, public meetings were held in which:

the design team set up its studio in a wood shop at Turner Tech and was open to the public all week. A presentation of work in progress was held on Friday, May 10th. *Residents, property and business owners as well as North Dade Chamber of Commerce, County staff and elected officials were present.*
...

... A series of presentations by County Staff were held and during that time further *citizen and professional input was taken into account.*¹⁴⁵

The invitation to be present to comment on a presentation is not a substitute for the meaningful involvement of community members in the decision-making process of what is going to happen in or to their community.

The lack of meaningful community involvement is even more concerning considering the demographics and historical racial makeup of the various UCDs. Below is a map of the areas zoned as “Negro Housing Areas” in Miami-Dade County in 1951¹⁴⁶ and a map of the UCDs throughout Miami-Dade,¹⁴⁷ which closely mirrors the “Negro Housing Areas” of the 1950s. Note that both maps identify the following neighborhoods: Ojus, Model City (Liberty City), Perrine, Goulds, Princeton, Naranja, and Leisure City (Modello).

144. *Model City/Brownsville Charrette Area Plan Report Executive Summary, supra* note 140 (emphasis added).

145. *North Central Charrette Area Plan Report Executive Summary, supra* note 140 (emphasis added).

146. N.D.B. CONNOLLY, *A WORLD MORE CONCRETE: REAL ESTATE AND THE REMAKING OF JIM CROW SOUTH FLORIDA* 187 (2016) (map by Gordie Thompson).

147. Standard Urban Center District Regulations, *supra* note 117.

Current Miami-Dade Urban Center Districts



Current Miami-Dade Urban Center Districts

1951 "Negro Housing Areas" in Miami Dade County



1951 "Negro Housing Areas" in Miami-Dade County

The demographics of UCDs, especially those with Jim Crow legacies, are typically poorer and contain a higher percentage of people of color.

UCD Demographics¹⁴⁸

UCD	Per Capita Income	Median Household Income	% Black	% Hispanic*	% White	% Below Poverty Line
Ojus	\$32,169	\$43,420	7%	46%	43%	15.1%
Model City (Liberty City)	\$11,076 ¹⁴⁹	\$26,600	84%	14%	1%	45.1%
Perrine	\$10,380	\$26,977	84%	14%	3%	40.7%
Goulds	\$11,477	\$29,333	49%	43%	5%	40.7%
Princeton	\$17,797	\$49,725	20%	64%	14%	24.8%
Naranja	\$11,612	\$29,149	35%	53%	7%	37.9%
Leisure City (Modello)	\$12,891	\$34,428	19%	73%	6%	35%

*Hispanic includes respondents of any race. Other categories are non-Hispanic.

148. All numbers are estimates. *Leisure City, FL*, CENSUS REP., <https://censusreporter.org/profiles/16000US1239950-leisure-city-fl> (last visited Feb. 1, 2019); *Naranja, FL*, CENSUS REP., <https://censusreporter.org/profiles/16000US1247700-naranja-fl> (last visited Feb. 1, 2019); *Princeton, FL*, CENSUS REP., <https://censusreporter.org/profiles/16000US1258975-princeton-fl> (last visited Feb. 1, 2019); *Goulds, FL*, CENSUS REP., <https://censusreporter.org/profiles/16000US1226950-goulds-fl> (last visited Feb. 1, 2019); *West Perrine, FL*, CENSUS REP., <https://censusreporter.org/profiles/16000US1276700-west-perrine-fl> (last visited Feb. 1, 2019) (indicating that the Perrine UCD is located in the West Perrine area); *Ojus, FL*, CENSUS REPORTER, <https://censusreporter.org/profiles/16000US1251125-ojus-fl> (last visited Feb. 1, 2019); *Household Income in Liberty City, Miami, FL*, STATISTICAL ATLAS, <https://statisticalatlas.com/neighborhood/Florida/Miami/Liberty-City/Household-Income> (last visited Feb. 1, 2019).

149. Per capita income was calculated using the individual census tracts for the bounded area of Liberty City. *Liberty City Neighborhood in Miami, Florida (FL)*, 33127, 33142, 33147, 33150 *Detailed Profile*, City-Data.com, <http://www.city-data.com/neighborhood/Liberty-City-Miami-FL.html> (last visited Feb. 1, 2019).

Miami-Dade County Demographics¹⁵⁰

County	Per Capita Income	Median Household Income	% Black	% Hispanic*	% White	% Below Poverty Line
Miami-Dade County	\$24,515	\$44,224	18.5%	67.7%	13.8%	18.2%

*Hispanic includes respondents of any race. Other categories are non-Hispanic.

Community concern regarding the UCD development process is captured by an incident in Ojus, one of the northernmost UCDs. In 2014, a 400-unit luxury condo apartment complex was approved administratively, and, because it complied with the zoning parameters in the Ojus Core sub-district, residents were not notified of the building’s proposal, approval, and construction.¹⁵¹ No public hearing took place for residents to express their concerns about the building.¹⁵²

Among other concerns, residents were worried, for example, about changes in traffic patterns because of the size of the construction project and the access points to enter the street from the building’s parking garage.¹⁵³ In response, Eric Silva, the County’s Senior Zoning Chief, said the current Zoning Code does not say where the developer can or cannot put the access points, and moreover, Silva added that “residents were under the impression that the County could not give a developer site plan approval without consulting with them first.”¹⁵⁴ Silva explained that “the Ojus Urban Area Zoning District . . . only required an administrative review” of plans submitted by developers.¹⁵⁵ He further stressed that “[i]t doesn’t need to go to a board for approval. There were no variances; they met the code, so we approved it.”¹⁵⁶ In other words, the whole development project from start to finish was only subject to administrative review, which did not require community participation.

150. All numbers are estimates. *Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/miamidadecountyflorida/POP060210> (last visited Feb. 1, 2019).

151. Jeffrey Pierre, *Ojus Residents Voice Concerns About a Proposed 400-Unit Luxury Complex*, MIAMI HERALD (Nov. 10, 2014), <http://www.miamiherald.com/news/local/community/miami-dade/aventura/article3727534.html> (last visited Mar. 30, 2019).

152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*

D. Gulfport, Mississippi: Optional Overlay

i. The Code and Its Adoption

Gulfport, Mississippi, has instituted what is known as an optional overlay of form-based code.¹⁵⁷ In the wake of Hurricane Katrina (“Katrina”), Gulfport was left with massive amounts of destruction.¹⁵⁸ This destruction also provided the city an opportunity to reconceptualize how it could grow and build in the wake of the disaster.¹⁵⁹ As part of its Comprehensive Plan and in conformity with state law,¹⁶⁰ in February 2007, Gulfport adopted a city-wide SmartCode.¹⁶¹ Unlike Miami and Nashville, the Gulfport “Code is an option for development of Communities and Neighborhoods in the City of Gulfport, Mississippi, and may, by proper planning process, be made mandatory in certain districts of the City.”¹⁶² Similar to Miami21, for areas in Gulfport zoned with the optional SmartCode overlay, “[a] proposal for a building or community plan that complies with this Code[,] may thereby be processed administratively, without public hearing.”¹⁶³

The optional overlay model in Gulfport follows the specifications of transects outlined in SmartCode.¹⁶⁴ For example, the T6 zone (i.e., the urban core) is zoned for Downtown Gulfport. Prior to passing the ordinance, Gulfport described its vision for this zone as follows:

[The] Code [for the Urban Core] is intended to encourage the area to also become richly mixed use, with specialty retail, offices, and residential in mixed use buildings, and a wide variety of quality restaurants. Buildings

157. *February 2017 Case Studies*, *supra* note 3. An optional overlay is different from the overlays seen in Nashville. In Nashville, the city can mandate a new zoning code in a particular area. In Gulfport, developers can choose to opt-in to the form-based overlay zoning code, or they can choose to be governed by the underlying traditional zoning code.

158. *Redevelopment Master Plan Charrette Book*, Gulfport, Mississippi, MISS. RENEWAL FORUM (Oct. 31, 2005), http://www.mississippirenewal.com/documents/Rep_Gulfport.pdf.

159. *Id.*

160. MISS. CODE ANN. §§ 17-1-1 to 17-1-27 (West 2019); CITY OF GULFPORT, MISS., CODE OF ORDINANCES, App. D, art. 1, § 1.1 (adopted Feb. 3, 2007); *see also Codes*, Mississippi Renewal Forum, http://www.mississippirenewal.com/documents/Rep_Codes.pdf (last visited Mar. 29, 2019).

161. CITY OF GULFPORT, MISS., CODE OF ORDINANCES, App. D—SmartCode (adopted Feb. 3, 2007); *Transect-Based Regulating Plans*, CENTER FOR APPLIED TRANSECT STUDIES, https://transect.org/regulating_img.html (last visited Mar. 29, 2019); *see also Codes That Support Smart Growth Development*, U.S. EPA, <https://www.epa.gov/smartgrowth/codes-support-smart-growth-development> (last visited Mar. 29, 2019).

162. CITY OF GULFPORT, MISS., CODE OF ORDINANCES, App. D, art. 1, § 1.3.3 (adopted Feb. 3, 2007).

163. *Id.* App. D, art. 7.

164. *Id.* App. D, art. 6.

are generally of large-scale, with mixed-use condominium buildings from 8 to 18 stories, and set close to street frontages.¹⁶⁵

In this area, developers can receive density bonuses if they provide a certain number of affordable units.¹⁶⁶

ii. Effects and Implementation

Gulfport neighborhoods Soria City, North Gulfport, and Turkey Creek which have majority Black populations represent a disproportionate concentration of Black residents in the Gulfport-Biloxi area where Blacks comprise less than 30% of the population.¹⁶⁷ These geographic concentrations were rooted in history, since the East-West railroad created a racial divide and Turkey Creek was a swamp land acquisition that was once promised to freed slaves.¹⁶⁸

These neighborhoods, which still represent the highest concentration of Blacks in the area, have historically been subject to the tumultuous economic history of Gulfport and bore the brunt of the environmental impacts of Katrina. Black residents historically congregated around the boat-building, fishing, and seafood industries, and have remained there despite the crash of these industries in the late 1970s and a failure to recover.¹⁶⁹ In addition to economic disaster, the most heavily concentrated Black census tracts in Gulfport faced the highest surge elevations of 16 to 22 feet due to Katrina.¹⁷⁰

After Katrina devastated these neighborhoods, the city was presented with a choice in how these neighborhoods could be redeveloped. Rather than recognizing the devastating impacts of both the economy and Katrina on these areas, the City of Gulfport characterized the area as a “blank slate” ripe for high-end, luxury development,¹⁷¹ and it became an epicenter of up-zoning. To invite developers to Gulfport, the City of Gulfport published the following description in 2010 on its website:

Like the artist with the blank canvas or an explorer who steps foot in a brand new land—as residents of Gulfport, Mississippi, we eagerly await the authors who will write the future chapters of our beloved hometown. . . . From the fury of Mother Nature comes the opportunity to re-define our city as a progressive new enterprise of hope and prosperity. When you bring

165. *Codes*, MISS. RENEWAL FORUM, at 15, http://www.mississippirenewal.com/documents/Rep_Codes.pdf (last visited Mar. 29, 2019).

166. CITY OF GULFPORT, MISS., CODE OF ORDINANCES, App. D, §§ 1.6–1.7, 5.9 (adopted Feb. 3, 2007).

167. Kate Driscoll Derickson, *The Racial Politics of Neoliberal Regulation in Post-Katrina Mississippi*, 104 ANNALS ASS'N AM. GEOGRAPHERS 889, 892 (2014).

168. *Id.*

169. *Id.* at 891.

170. *Id.* at 893.

171. *Id.* at 889–93.

your vision to the shores of Gulfport, you will take your place among the other captains and watch your own ship come in.¹⁷²

Geographer Kate Driscoll Derickson argues:

In the same way that the racialized concept of blight justified and created opportunities for new forms of urban development under the guise of urban renewal in the postwar era (internal citation omitted), the highly racialized and impoverished nature of these neighborhoods worked to justify and enable the narrative that the storm had rendered them blank slates and, in so doing, created new opportunities for intensifying and further accomplishing the vision of the city promoted by regional boosters.¹⁷³

The development in Gulfport has been focused on inventing a flourishing tourism industry rather than ensuring municipal equity and creating housing or opportunities for poor,¹⁷⁴ long-term residents.¹⁷⁵ This focus has paved the way for the development of an aquarium, casino, and hotels, geared toward the tourism industry.¹⁷⁶ Characterizing a disenfranchised, historically Black area of Gulfport as a “blank slate” signals just how tangential the city sees the residents’ role in the public input and participation process.

iii. Public Participation and Community Response

Andrés Duany, who was also largely responsible for Miami21 and other form-based codes throughout the country, organized in 2005 what was known as a redevelopment charrette.¹⁷⁷ Rather than engaging community members, the week-long charrette brought together “over 200 hundred

172. Kate Derickson, *After Hurricane Katrina, Devastated Black Neighborhoods Created an “Opportunity” for Redevelopment That Focused on Gentrification*, LSE US CENTRE BLOG (July 7, 2014), blogs.lse.ac.uk/usappblog/2014/07/07/after-hurricane-katrina-devastated-black-neighborhoods-created-an-opportunity-for-redevelopment-that-focused-on-gentrification.

173. Derickson, *supra* note 167, at 893.

174. *Id.* at 892 (“Prior to Katrina, in Harrison County, which includes both Gulfport and Biloxi, 27% of the African American population lived in poverty, whereas only 10% of the white population were poor (U.S. Census Bureau 2000). Median household income for white families was \$38,353 in 2000, compared with \$29,394 for African American families (U.S. Census Bureau 2000). Data from the 2010 census show an even starker divide, with median household income for whites increasing at a rate of 33% since 2000 (to \$50,903), with African American household income increasing at a rate of just 3.6% (to \$31,013; U.S. Census Bureau 2010). Further, neighborhoods associated with low-income and poverty status are also the historic centers of African American life in the region.”).

175. Caray Grace, *Regional Convention and Visitors Bureau Aims to Promote Tourism Along the Coast*, WLOX NEWS (Aug. 25, 2015), <http://www.wlox.com/story/29879014/gulfport-cvb-aims-to-promote-tourism-along-the-coast>.

176. Jonathan Brannan, *Downtown Gulfport Seeing a Development Boom*, WLOX NEWS (Apr. 3, 2018), <http://www.wlox.com/story/37871346/downtown-gulfport-seeing-a-development-boom>.

177. *Redevelopment Master Plan Charrette Book, Gulfport, Mississippi*, *supra* note 158, at 3.

professionals from around the world” and resulted in “redevelopment plans for 11 distinct communities along the Mississippi Gulf Coast.”¹⁷⁸ However, the resulting code and developments demonstrate that low-income, long-term residents’ interests were not valued. Ultimately, the Governor of Mississippi diverted \$600 million of the grant money received from HUD intended to aid in the development of housing, particularly for low-income Mississippians, to redevelop the state port of Gulfport.¹⁷⁹ The Governor of Mississippi also received “a series of waivers for the low-income requirement attached to most funding from the HUD.”¹⁸⁰

The SmartCode becomes operational in Gulfport at the option of a community where a Community Plan is developed and adopted and “may, by proper planning process, be made mandatory in certain districts of the City.”¹⁸¹ In areas that have adopted form-based code, the Consolidated Review Committee (“CRC”) approves or denies applications for development after “a minimum evaluation from all applicable regulatory authorities within the City and consensus of “several members of the Committee, including the Community Representative, that the “application complies with the requirements of this Code and of the relevant Official Community Plans.”¹⁸² The Gulfport CRC is unique in that it allows community members to sit on the CRC.¹⁸³ Residents in any of these opt-in areas may petition the mayor and city council for representation on the CRC.¹⁸⁴ If petitioned, “the Council member or members representing the ward or wards containing the Community Planning Area shall nominate a resident of the Community Planning Area to act as Community Representative for that Community Planning Area to the CRC, with approval by the Mayor and City Council.”¹⁸⁵ Additionally, “an accurate log of applications submitted for CRC review or hearing shall be made available for routine inspection by the public, and shall include the applicant, subject site, date, and type of review or hearing.”¹⁸⁶

IV. Possible Legal Responses

Transitioning to form-based codes can have inequitable consequences on vulnerable communities. Municipalities, for the most part, are neither considering nor addressing social equity issues at the outset. For example, the Form-Based Codes Institute has provided “best practices of form-based

178. *Id.*

179. Derickson, *supra* note 167, at 897.

180. *Id.*

181. CITY OF GULFPORT, MISS., CODE OF ORDINANCES, App. D, § 1.3.3 (adopted Feb. 3, 2007).

182. *Id.* § 1.4.3.

183. *Id.* § 1.4.3 (b), (d).

184. *Id.*

185. *Id.* § 1.4.3(d)

186. *Id.* § 1.4.8.

coding” to determine if a development regulation is a well-crafted form-based code.¹⁸⁷ According to the Institute, the three main questions used to evaluate whether the form-based code fits within the “best practices” guidelines are: (1) “Is the code enforceable?”; (2) “Is the code easy to use?”; and (3) “Will the code produce functional and vital urbanism?”¹⁸⁸ Notably, ensuring social equity is not even tangentially mentioned as a best practice. Nor is the protection of vulnerable populations from adverse consequences caused by the implementation of the code.¹⁸⁹ This is not to say that a social equity analysis is performed in municipalities that follow traditional zoning. Unfortunately, this analysis is hardly ever carried out in zoning decisions.

Consequently, such policies must be challenged, or, at a minimum, protections must be implemented to ensure that these communities are not forced to bear the burden of the code, while the rest of society reaps the benefits. Importantly, although many similarities exist among the form-based codes adopted across the nation, each area has its own history with its own communities, demographics, needs, and desires. Accordingly, there is no one-size-fits-all solution, including in what are appropriate public notice and hearing procedures. Below we explore possible legal challenges and policy solutions are explored that, having been tailored to the unique context, can combat potential inequities brought about through the transition to form-based codes.

A. Possible Legal Challenges

The potential legal challenges that are often cited in scholarly articles discussing form-based codes focus on the enforceability of aspects of the code.¹⁹⁰ The four challenges typically addressed are (1) constitutional concerns regarding substantive due process, specifically design code being void for vagueness if it requires a subjective interpretation by the permitting authority;¹⁹¹ (2) constitutional concerns regarding the potential violation of property owners’ First Amendment right to freedom of speech if the regulations are so detailed that they rise to the level of a restraint

187. *Identifying & Evaluating Form-Based Codes*, FORM-BASED CODES INST., <https://formbasedcodes.org/identifying-evaluating> (last visited, Jan. 31. 2019).

188. *Id.*

189. *Id.*

190. Robert J. Sitkowski & Joel Russel, 8 NY ZONING L. & PRAC. REP. 7–8 (Nov./Dec. 2007), available at https://law.pace.edu/sites/default/files/LULC/Conference_2013/Applying%20Form%20Based%20Codes%20in%20the%20Real%20World%20-%20Full.pdf; Mark White, *Form Based Codes: Practice & Legal Considerations*, INST. ON PLANNING, ZONING & EMINENT DOMAIN (Nov. 18, 2009), http://www.planningandlaw.com/uploads/SMW_Paper-Presentation.pdf; Elizabeth Garvin & Dawn Jourdan, *Through the Looking Glass: Analyzing the Potential Legal Challenges to Form-Based Codes*, 23 J. LAND USE & ENVIRON. LAW 415–20 (2008).

191. This concern is often tied to the general statements that are included in the code regarding design, compatibility, and appearance.

on expression; (3) preemption by controlling state law, for example, some states prohibit aesthetics-based zoning, *viz.* zoning that is principally designed to promote aesthetics; and (4) equal protection and due process concerns regarding “spot zoning.”¹⁹²

Notably, the legal challenges discussed in the literature regarding form-based codes do not address challenging the municipality for the potential discriminatory effects brought about by the code. The Fair Housing Act may provide an avenue for legal recourse regarding such discriminatory effects.¹⁹³ Under the Fair Housing Act,¹⁹⁴ affected parties may challenge a practice or policy that “has a discriminatory effect where it actually or predictably results in [1] a disparate impact on a group of persons [2] or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.”¹⁹⁵

Under the 2013 HUD regulation on disparate impact, a three-step burden-shifting analysis is used to determine liability under disparate-impact claims and segregative-effect claims.¹⁹⁶ The first step requires the plaintiff to establish a *prima facie* case that the challenged policy “caused or predictably will cause a discriminatory effect.”¹⁹⁷ To do so, a plaintiff must show that (1) the defendant used a “practice or policy” in making housing-related decisions; (2) a class of persons protected by the FHA was harmed by this policy more than others; and (3) this harm was actually caused by defendant’s policy. If the plaintiff satisfies the requirements of the first step, the burden then shifts to the defendant, who is given the opportunity to prove that its challenged policy is “necessary to achieve one or more substantial, legitimate, nondiscriminatory interests.”¹⁹⁸ To be legally sufficient, the “justification must be supported by evidence and may not be hypothetical or speculative.”¹⁹⁹ Finally, if the defendant satisfies this burden, the

192. See sources cited *supra* note 190. Some courts have held it to be problematic if the form-based code weaves a new use into single-use areas because certain tracts of land would be permitted for one use, but similarly situated parcels would not.

193. 24 C.F.R. § 100.500; see also Anthony V. Alfieri, *Black, Poor, and Gone: Civil Rights Law’s Inner-City Crisis*, 54 HARV. C.R.-C.L. L. REV. (forthcoming 2019).

194. 24 C.F.R. § 100.500; see also Robert G. Schwemm & Calvin Bradford, *Proving Disparate Impact in Fair Housing Cases After Inclusive Communities*, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 685 (2016); see also Robert G. Schwemm, *Segregative-Effect Claims Under the Fair Housing Act*, 20 N.Y.U. J. LEGIS. & PUB. POL’Y 709 (2017).

195. 24 C.F.R. § 100.500.

196. *Id.*; see Schwemm, *Segregative-Effect Claims Under the Fair Housing Act*, *supra* note 194, at 712.

197. Schwemm & Bradford, *Proving Disparate Impact in Fair Housing Cases*, *supra* note 194, at 693.

198. 24 C.F.R. § 100.500(b).

199. *Id.*

plaintiff may still prevail by proving that the defendant's interest "could be served by another practice with a less discriminatory effect."²⁰⁰

Discriminatory-effect claims are data-driven, and the type of claim depends on the facts relevant to the specific municipality regarding the harm suffered by protected classes. In the present case, a plaintiff could make a prima facie disparate-impact claim in three different ways. First, by comparing the various racial demographics of the people impacted by up-zoning (especially in the areas with the highest intensity and density) and their displacement (and, in some instances, being priced-out of the entire municipality). Second, such a claim could be shown by demonstrating that evictions or demolitions (caused by up-zoning) have disproportionately affected certain protected classes. Third, a segregative effect claim could be supported by data demonstrating that people from somewhat integrated neighborhoods (for example, a neighborhood that is 70% Black, 25% White, and 5% other), and are being displaced and forced to live in areas with higher rates of segregation (for example, a neighborhood that is 95% Black, 3% White, 2% other).

If the court found that the plaintiff had met its burden in proving a prima facie disparate impact case, the municipality could try to demonstrate that the adopted form-based code is necessary "to achieve one or more substantial, legitimate, nondiscriminatory interests."²⁰¹ The analysis to determine whether a challenged policy is necessary to achieve such an interest is "very fact intensive" and "must be determined on a case by case basis."²⁰² That said, ensuring the safety of residents²⁰³ and implementing occupancy limits, whether to preserve property values²⁰⁴ or a business necessity,²⁰⁵ have been held to be legitimate interests. However, a business justification of preventing damage to the apartments, reducing ongoing maintenance, and preserving the eventual resale costs for a two-person occupancy limit (which had a disproportionate effect on families with children), was not held to be a legitimate, non-discriminatory policy.²⁰⁶

200. 24 C.F.R. § 100.500(c).

201. 24 C.F.R. § 100.500(c)(2).

202. Schwemm, *Proving Disparate Impact in Fair Housing Cases*, *supra* note 194, at 696 n.49 (citing Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11,470–11,471).

203. *See* United States v. Hillhaven Corp., 960 F. Supp. 259, 263 (D. Utah 1997).

204. *See* Pfaff v. U.S. Dep't of Hous. & Urban Dev., 88 F.3d 739 (9th Cir. 1996).

205. *See* Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243 (10th Cir. 1995); *see also* United States v. Weiss, 847 F. Supp. 819 (D. Nev. 1994).

206. Fair Hous. Council of Orange Cty., Inc. v. Ayres, 855 F. Supp. 315, 319–20 (C.D. Cal. 1994). Another example of a business justification not rebutting a prima facie disparate impact case was a housing authority's justifications for vacating and demolishing a low-income housing apartment complex. The housing authority justified its actions because of "a need for low income housing density reduction, a need to eliminate a housing design that contributed to a concentration of criminal activity and drug use, and a lack of

If the municipality meets its burden, then the plaintiff has the opportunity to prove that the municipality could have adopted policies that served its stated legitimate interests but that cause less discriminatory effects on the protected classes.²⁰⁷ Such examples could include implementing legislation that increases the likelihood of meaningful community participation by, for example, requiring large projects or developments in certain neighborhoods be approved by community boards or requiring developers to adopt community benefits agreements for projects in certain areas. Additionally, policies can be adopted to decrease the likelihood of displacement of protected classes, by, for example, implementing mandatory inclusionary zoning, adopting just-cause eviction regulations, or requiring developers to assess and mitigate the potential displacement risk of their development (such a tool would be similar to an environmental impact assessment, but would be applied to displacement and designed to ensure compliance with the Fair Housing Act instead of mitigating the harm to the environment and ensuring compliance with the relevant environmental statutes).

If the municipalities have not adopted policies to mitigate the potential disparate impact or segregative effect on minority communities, it is possible that they will not be able to demonstrate they could not achieve their purpose in a less discriminatory way. Thus, municipalities that have enacted form-based codes with disproportionate adverse effects on minorities may be found to be in violation of the Fair Housing Act.

B. Potential Policy Solutions

Several legislative initiatives could provide tools to increase the likelihood of meaningful community participation and to decrease the likelihood of displacement of low-income minority residents. Such initiatives include community involvement in the approval process for developments, mandated community benefits agreements, mandatory inclusionary zoning, just cause evictions, moratoriums on development, and the requirement to assess and mitigate the potential displacement risk of new developments.

funding to make improvements, [which were found to be] pretextual because they were unsupported by evidence" and thus not legitimate, non-discriminatory policy objectives. *Charleston Hous. Auth. v. U.S. Dep't of Agric.*, 419 F.3d 729, 741 (8th Cir. 2005).

207. *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015) (holding disparate impact liability available under the Fair Housing Act). Prior to *Inclusive Communities* and the 2013 HUD regulation on disparate impact, some courts placed the burden on the defendant, instead of the plaintiff. For example, the Court in *Ayres* noted that, even if the defendant had shown evidence to support their proposed justification, the defendant would have to show "the occupancy restriction is the least restrictive means to achieve defendant's purpose." *Fair Hous. Council*, 855 F. Supp. at 320.

i. Meaningful Community Participation

As discussed, the opportunity for community input prior to the enactment of the form-based code (e.g., through charrettes), is not sufficient to safeguard meaningful community participation in the decision-making process, especially participation of low-income communities of color. For example, charrettes address a variety of issues from up-zoning to reviewing and providing feedback on design options. Regardless of how thorough and inclusive those processes are, the anticipated and unanticipated consequences of changing the character of entire neighborhoods with a single legislative action need to be checked both in the short term, to ensure the immediate concerns from communities are addressed, and the long term, to ensure the changing needs of communities are being addressed by the code, even years after it has been adopted.

Along the lines of the Gulfport case study, one of the options to ensure meaningful community participation is to add a provision that approval of a community board is necessary for developments of a certain size or scale city-wide in minority neighborhoods, low-income minority neighborhoods, or former Jim Crow neighborhoods. This type of arrangement would allow the community to be in a position to participate in the analysis to determine that a proposal complies with applicable planning and zoning requirements, to propose changes to a development proposal that would reduce negative impacts on the community, and/or to negotiate a community benefits agreement with a developer.

A second option to ensure meaningful community participation is through an ordinance requiring community benefits agreements.²⁰⁸ These agreements can be tailored to the community's needs and include provisions for, among other things, affordable housing, local hiring preferences, community centers, green spaces, health services, relocation assistance, job training, living wage programs, and, after-school care programs. It is unlikely for these types of agreements to develop organically in areas with form-based codes because of the removal of the community's leverage to negotiate with the developers when they build as a matter of right due to the administrative approval process after the initial up-zoning is imbedded in the code. By passing an ordinance mandating the use of community benefits agreements, the municipality can give this leverage back and enable the community to avoid or mitigate negative impacts.

208. A community benefits agreement is a binding agreement entered into between the developer of a land project and either the municipality or community organizations, or both, with the goal of providing benefits tailored to the community's needs. For general information on community benefits agreements, see *Community Benefits 101*, *supra* note 86.

In November 2016, Detroit, Michigan,²⁰⁹ became the first city to pass a city-wide community benefits ordinance.²¹⁰ Under this ordinance, all development projects are required to involve community representation and negotiation in the development process.²¹¹ Although a municipal-wide ordinance would safeguard more vulnerable residents, a requirement for community benefits agreements could also be limited to a smaller area, such as census tracts with a certain percentage of minority residents, census tracts with a certain percentage of low-income residents, census tracts that are on high ground (especially relevant in areas that are likely to be severely affected by sea-level rise), or former Jim Crow neighborhoods.

ii. Anti-Displacement Initiatives

As explained in Part II, transitioning to form-based code practically requires mass up-zoning, which facilitates rapid development since many development projects only require administrative approvals. Rapid development in low-income areas often results in residents being priced out and displaced, otherwise known as gentrification. Anti-displacement initiatives are one way that municipalities can counteract the increased risk of displacement, particularly for vulnerable low-income minority communities.²¹²

When designing these policies, it is important to note that although both low-income homeowners and low-income renters are at increased risk of displacement, the strategies necessary to protect these two types of residents differ. Low-income homeowners located in form-based locations that

209. Although Detroit has not adopted form-based code citywide, the city is in the process of adopting a form-based code for Brush Park. See *Detroit Brush Park Plan and Form-Based Code*, UTILE DESIGN (Jan. 2018), <https://www.utiledesign.com/work/detroit-brush-park-form-based-code>; see also *Development Guidelines*, BRUSH PARK COMMUNITY DEV'T CORP., <http://www.brushparkcdc.org/guidelines> (last visited Jan. 31, 2019). Further, form-based codes may be considered for other areas as well, since the city is in the process of updating the zoning ordinance to “[p]repare a form-based code overlay district or chapter” and “[e]xplore new zoning concepts . . . including allowing a greater mix of compatible land uses, expanding missing housing types, etc.” See *City of Detroit Seeks Zoning Ordinance Update*, FORM-BASED CODES INST. (Mar. 21, 2018), <https://formbasedcodes.org/rfps/city-detroit-seeks-zoning-ordinance-update>.

210. Christine Ferretti, *Prop B Wins, Prop A Fails in Detroit Community Benefits*, DETROIT NEWS (Nov. 9, 2016), <https://www.detroitnews.com/story/news/politics/elections/2016/11/08/detroit-community-benefits-results/93507310>.

211. *Id.*

212. For anti-displacement strategies and policy tools, see *All-In Policies Toolkit*, POLICYLINK, <http://allincities.org/toolkit> (last visited Mar. 14, 2019); see also Kalima Rose & Teddy Ky-Nam Miller, *Healthy Communities of Opportunity: An Equity Blueprint to Address America's Housing Challenges*, POLICYLINK (2016), https://www.policylink.org/sites/default/files/HCO_Web_Only.pdf. For additional anti-displacement policies, see NAT'L COALITION FOR ASIAN PACIFIC AMERICAN COMMUNITY DEVELOPMENT & COUNCIL FOR NATIVE HAWAIIAN ADVANCEMENT, *ASIAN AMERICAN & PACIFIC ISLANDER ANTI-DISPLACEMENT STRATEGIES* (Aug. 2017), http://www.nationalcapacd.org/wp-content/uploads/2017/08/anti_displacement_strategies_report.pdf.

have been up-zoned may find themselves at risk of losing their homes. Such homeowners are subject to over-enforcement of the housing code due to over-reporting of violations by speculators/developers or by new residents that have moved into the area.²¹³ When a residence is found to be in violation of the housing code, the municipality fines the property owner. This fine typically accrues daily and can reach large amounts in a relatively short period of time, at which point the city may place a lien on the property until the fine is paid. Since low-income homeowners are often unable to pay these fines, they are forced to sell their home and, in fact, may not recover a fair value of the house because of the liens placed on the property. To avoid this possibility, a municipality can allocate funds for qualifying homeowners to help repair their homes so that they are in compliance with the housing code. Additionally, the municipality may adopt a mitigation policy to assist with the reduction or elimination of liens for low-income homeowners.

Low-income tenants face different issues. They tend to be the first to get displaced because they have limited protections; they can be evicted, their landlord could decide to not renew their lease agreement, or the landlord can let the residence fall into disrepair and eventually the residence will be condemned, forcing all the tenants to leave.²¹⁴

As a “city of foreign buyers, absentee landlords, and speculative real estate transactions,”²¹⁵ many landlords may not prioritize keeping the community together over meeting their profit targets. The West Grove is an example where “the land is mostly owned by absentee landlords, who

213. For example, low-income homeowners in the West Grove have expressed such concerns to the University of Miami’s School of Law Environmental Justice Clinic during Coconut Grove Ministerial Alliance meetings in mid-2018. (These documents are on file with authors.)

214. Such was the case with South Winds, an apartment complex located in the West Grove with affordable housing units. The landlord allowed the building to fall into disrepair, and the tenants were evicted when the building was condemned and later demolished. Community Meeting of Tenants and the University of Miami Environmental Justice Clinic at South Winds (Sept. 29, 2016) (notes on file with the authors).

215. *A New Path to Affordable Housing Is Coming to Miami*, NEW TROPIC (May 10, 2016), <https://thenewtropic.com/community-land-trust> (“When [community land trusts] work[], units stay affordable pretty much forever because they can only be sold to other low-income qualifying home buyers at a rate set before the property values start spiraling. Rates of gentrification slow because residents have a place they can afford long-term. Struggling neighborhoods stabilize because they have residents with a sense of ownership that prompts them to invest in the community. In [the City of Miami] of foreign buyers, absentee landlords, and speculative real estate transactions, that’s an unusual degree of longevity—the kind of longevity that created culturally rich neighborhoods like Little Havana and Little Haiti, which are struggling to hold together today.”).

have done little to improve properties.”²¹⁶ Increased density and intensity provide more incentive for owners to sell the land to someone who would redevelop or demolish the current structure and build a more profitable development. Given that the majority of municipalities do not have mandatory inclusionary zoning or a requirement for developers to build affordable housing units, tenants are likely to be priced-out of the area and forced to move, often to areas that are further away from their community and municipal resources, including job markets and public transit.

Mandatory inclusionary zoning and just-cause eviction ordinances are two policy initiatives that may help protect low-income renters. Mandatory inclusionary zoning requires that a certain percentage of units in new developments be affordable.²¹⁷ Similar to the options for community benefits agreements, mandatory inclusionary zoning can be adopted across a municipality or in targeted areas that most need affordable housing. Mandatory inclusionary zoning may also be expanded to the commercial side, requiring developers to retain a certain percentage or amount of locally owned businesses. Under just cause eviction ordinances, renters can only be evicted for causes that are stipulated in the ordinance, and, thus, renters are protected from landlords unfairly evicting tenants simply because they want to make a profit while the housing market rises.²¹⁸

In addition to advancing policies that are specifically designed to slow displacement, municipalities can also adopt interim controls to slow development while the municipality examines the potential impacts and decides on the best course of action.²¹⁹ For example, in 2008, the San Francisco Planning Department adopted measures to specifically address high-risk neighborhoods.²²⁰ One of those neighborhoods was the Mission District, a Hispanic-majority neighborhood where a rise in medium-to-large scale

216. Jenny Staletovich & Patricia Borns, *West Grove: The Miami Neighborhood That Time Forgot*, MIAMI HERALD (Feb. 26, 2014), <https://www.miamiherald.com/news/local/in-depth/article1948901.html> (last visited Mar. 14, 2019).

217. See *Inclusionary Zoning*, All-In Cities Policy Toolkit, POLICYLINK, <http://allincities.org/toolkit> (last visited Jan. 31, 2019) (follow “Housing/anti-displacement,” then select “Inclusionary Zoning” under policy tools).

218. See *Just Cause*, All-in Cities Policy Toolkit, POLICYLINK, <http://allincities.org/toolkit> (last visited Jan. 31, 2019) (follow “Housing/anti-displacement,” then select “Just cause” under policy tools).

219. JULIAN CONRAD JUERGENSEMEYER ET AL., *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* § 9.6, *Moratoria and Interim Controls* (3d ed. West 2018).

220. *Interim Controls*, CITY & COUNTY OF SAN FRANCISCO PLANNING DEP’T, <http://sf-planning.org/interim-controls> (last visited Jan. 31, 2019); see also *Mission 2015 Interim Controls*, SAN FRANCISCO PLANNING DEP’T (July 9, 2015), http://default.sfplanning.org/Citywide/Mission2020/mission2020_Mission2015_InterimControls-070915_FINAL.pdf (last visited Mar. 14, 2019).

development had driven up the costs of living for residents.²²¹ San Francisco adopted an interim policy resolution in 2015 specific to the Mission District. Although it did not halt development, it introduced a higher level of scrutiny to approve developments.²²² These efforts culminated in the Mission Action Plan 2020, which was approved by the San Francisco Planning Department in March 2017.²²³ In addition to the inclusion of a social impact evaluation requirement, the plan made permanent the development restrictions that the interim controls had placed in effect temporarily.²²⁴

Instead of interim controls, cities can adopt temporary moratoriums to halt development, while the municipality assesses the impacts of development.²²⁵ For example, in 2007, the city council in Providence, Rhode Island, approved a twelve-month moratorium for their Fox Point neighborhood.²²⁶ The relocation of I-95 had opened up an area of desirable waterfront property in an otherwise historically low-income area. Recognizing that this neighborhood had already experienced substantial displacement due to the construction of the I-95, the city deemed the twelve-month halt on all construction would be an essential time to “step back and look at what we’re doing.”²²⁷

Municipalities can also expand policies that require developers to mitigate the harm caused by their developments through displacement assessments. Although this policy proposal has not been implemented,²²⁸ it could operate like the requirements of an environmental impact assess-

221. Laura Wenus, *Planning Puts Brakes on SF Mission Development*, MISSION LOCAL (Jan. 15, 2016), <https://missionlocal.org/2016/01/planning-puts-brakes-on-sf-mission-development>.

222. *Executive Summary Mission 2015 Interim Controls*, S.F. PLANNING DEP’T (Aug. 6, 2015), http://commissions.sfplanning.org/cpcpackets/2015-000988CWP_08-06-15.pdf. Under the interim controls, the larger the project, the higher the requirement for affordable housing units; however, projects that contained 100% affordable housing units and projects that met the targets for the production of low-income housing were exempt from the interim controls. *Id.*

223. *Mission Action Plan 2020, Annual Status Report*, S.F. PLANNING DEP’T (Oct. 2018), http://default.sfplanning.org/Citywide/Mission2020/MAP2020_Status_Report_2018.pdf.

224. J. K. Dineen, *The Bar May Be Raised Even Higher for New Housing in the Mission*, S.F. CHRON. (Jan. 14, 2016), <https://www.sfchronicle.com/bayarea/article/The-bar-may-be-raised-even-higher-for-new-housing-6757376.php>.

225. See JUERGENSMEYER ET AL., *supra* note 219.

226. Sara Molinaro, *City Council Approves Yearlong Development Moratorium in Fox Point*, BROWN DAILY HERALD (July 16, 2007), <http://www.browndailyherald.com/2007/07/16/city-council-approves-yearlong-development-moratorium-in-fox-point>.

227. *Id.*

228. The City of Portland’s Bureau of Planning and Sustainability has developed a Vulnerability Risk Assessment tool to “identify census tracts within the City of Portland that have higher-than-citywide average populations with characteristics that make resisting displacement more difficult: they are renters rather than homeowners, belong to communities of color, lack college degrees, and have lower incomes.” 2012

ment²²⁹ or a social impact assessment.²³⁰ Accordingly, a displacement assessment²³¹ would require the developer to undertake a study to identify who is likely to be displaced by the proposed development. This analysis should include whether those that are likely to be displaced belong to a protected class and, if so, whether they are being disproportionately adversely impacted in comparison to non-protected classes. Additionally, developers should analyze whether those that are at risk of displacement are likely to move to a more segregated area (by, for example, being priced out of less segregated areas), if displaced. Then, for the development to be approved, the developer would be required to provide a mitigation plan to minimize the displacement impact and the potential fair-housing concerns. This displacement assessment could be required of all developments in a municipality or could be limited to census tracts, with higher percentages of minority residents, low-income residents, or low-income minority residents on high ground that may be subject to climate gentrification.

V. Conclusion

Zoning laws were forged in an effort to enhance the well-being of society. When determining a policy's impact, it is good practice to consider its effect on the most vulnerable members of the population that the policy will affect. As part of this analysis, when evaluating zoning policies, it is important to ensure that the goal is not merely to benefit a particular geographic area, but to enhance the well-being of the community that lives there, as well as society-at-large. Benefiting the area and the people may sound like the same goal, but ensuring each objective is met requires a different analysis. Unfortunately, the betterment of a geographic space has often been achieved by sacrificing the welfare of the people that live there by displacing them.

Form-based zoning may be the solution that city planners have been looking for to address urban sprawl and environmental concerns and to promote walkability and beautiful streetscapes. However, the implementation of this livable city should benefit all and not come at the expense of the most at-risk members of society. Urban renewal can and should be implemented to increase the well-being of all of society, which includes

Vulnerability Analysis of Gentrification and Displacement Study, CITY OF PORTLAND'S BUREAU OF PLANNING & SUSTAINABILITY, <https://www.portlandoregon.gov/bps/66107>.

229. U.S. EPA, ENVIRONMENTAL IMPACT ASSESSMENT, <http://www.epa.ie/monitoring/assessment/assessment/eia> (last visited Jan. 9, 2018).

230. Ana Maria Esteves & Frank Vanclay, *Social Impact Assessment*, INTERNATIONAL ASSOCIATION FOR IMPACT ASSESSMENT, <http://www.iaia.org/wiki-details.php?ID=23> (last visited Jan. 9, 2019).

231. Tim Iglesias, *Housing Impact Assessments: Opening New Doors for State Housing Regulation*, 82 OR. L. REV. 433 (2003) (laying out the framework for a housing impact assessment regime that is prepared by local government).

the communities that have been historically discriminated against and that have limited political clout—in short, vulnerable communities.

While transitioning to form-based code, we must ensure that we listen to the concerns of the communities that are directly affected by zoning changes and act on them to make sure principles of equality and inclusion are furthered. The exclusion of vulnerable communities from the decision-making process and the lack of understanding regarding public notice requirements for developments in form-based code are evidenced by resident Phillip Murray in the Goulds UCD. He voiced concerns over the administrative approval of Karis Village, an eighty-eight-unit, low-income housing development that primarily serves homeless veterans.²³² The Goulds UCD was adopted in 2006, and Karis Village's site plan was approved in 2016.²³³ In 2017, Murray questioned: "[H]ow can an apartment complex (Karis Village) be constructed with little or no community input? . . . [H]ow does Goulds benefit from this project?"²³⁴ If municipalities transitioning to form-based codes incorporate more robust and continuous participation mechanisms and proactively address displacement impacts, these questions may no longer arise.

232. Phillip Murray, Jr., *Letters to the Editor, Low-Cost Housing*, MIAMI HERALD (Apr. 16, 2017), <https://www.miamiherald.com/opinion/letters-to-the-editor/article144950014.html>. Note that Karis Village was completed in 2018. *Karis Village—Miami, Florida*, GREEN MILLS GROUP, <https://www.greenmillsgroup.com/project/karis-village-miami-dade-county-florida> (last visited Mar. 30, 2019).

233. MIAMI-DADE COUNTY, FLA. CODE OF ORDINANCES, ch. 33, art. XXXIII(L); Letter from Nathan Kogon, Assistant Director of Dev. Serv. Div., Dep't of Regulatory & Econ. Research, to Jorge Navarro, Karis Village site plan development applicant regarding Approval of Administrative Site Plan Review for Karis Village (Sept. 2, 2016), http://pzimage.miamidade.gov/images/new_documents/A2016000015/DAL.pdf.

234. See Murray, Jr., *supra* note 232.