

The Legal Context for the Smart Code  
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The wall of impediments to traditional neighborhood developments is high and the bricks are tightly packed. Many communities are disappointed to learn that just changing their zoning code does not enable, much less encourage, the creation of traditional neighborhood development (“TNDs”). The Smart Code responds to the need for coordinated change to numerous codes. The Smart Code creates an overlay district in which numerous elements of the underlying code provisions are changed if the developer is willing to proceed with a TND in lieu of conventional development. The Smart Code contains elements of zoning, subdivision, and noise ordinances as well as comprehensive planning, building codes and conservation codes. The Smart Code even suggests policy positions that will guide other decisions by the local officials.

Not all of these elements can necessarily be implemented at once. Sometimes legislative authority limits the ability to move forward with some aspects of the code, and these elements should guide the locality in seeking future authority. The Smart Code provides a comprehensive roadmap for implementing traditional neighborhood development.

The Smart Code translates transect-based comprehensive planning into a largely form-based overlay district. It does not displace the underlying conventional zoning. It makes doing a TND possible by-right; it even incentivizes this type of development. The choice not to displace the existing zoning scheme is an important political and legal strategy decision. To comprehensively and fairly replace the existing zoning system might take years and set in motion political and legal battles, dooming the Smart Code and postponing TND projects. By implementing the Smart Code as an overlay, no rights are lost and choices are expanded. Later, if all stakeholders are comfortable with the change, the old code may be moved from “by-right” to “by-special use permit.” While avoiding confrontation, this strategy makes it important that the TND uses be by-right and the incentives be well thought out.

Just as the transect must be locally calibrated in order to lay the proper basis for the Smart Code, the legal elements must also be locally calibrated. Different parts of the country have different limits on various techniques and strategies used in the Smart Code. The code can easily be adjusted for these differences. Some examples of areas that sometimes require adjustment are the provisions dealing with transferable development rights, fast-tracking approvals, building code waivers and appeals processes.

A very few elements of the Smart Code are so widely unavailable that they should be considered more aspirational than currently realistic under the law. For example, the Smart Code presents the important concept of increasing the regulatory flexibility regarding environmental constraints in urban cores while reducing the flexibility in conservation zones. While local government may have the ability to increase the difficulty of permitting in conservation zones, it does not typically control the federal and state agencies that set the standards in the urban core and, thus, cannot by ordinance make these regulations less restrictive. The locality can, however, work with the agencies to implement regional permitting plans or even pre-permit areas for intensive development to essentially the same end.

The Smart Code is a rich “program” that plugs into the transect “operating system.” It must be locally calibrated in order to comply with state and local laws. To the extent some elements of the Code cannot currently be implemented, the Code provides a roadmap for seeking additional authority to allow and encourage TNDs. Inherent in the Code is a rich approach to comprehensive planning, a political strategy and a form-based code that results in substantial benefits to the locality.