Urban sprawl is a serious problem. It affects not just the City of Atlanta, but more generally the Atlanta metropolitan area along with numerous other metropolitan areas nationwide. Residents of the city are exposed to frequent reports of the traffic congestion in and around the city, stories of unchecked growth leading to a serious strain on the existing infrastructure, the destruction of green space and undeveloped land and the ongoing water crisis. From this, one might reasonably conclude that the way Atlantans think about zoning and land use planning needs a major overhaul. It would be naïve to think that this overhaul can be accomplished overnight. However, with the proper regulatory framework and buy-in from all interested parties Atlanta can mitigate the effects of the sprawl and move towards a “smart growth” model that will serve the entire city and state for the next 25 years.

This paper will argue that the City of Atlanta should abandon the current dual zoning code system (i.e. conventional zoning districts and Quality of Life Zoning) and associated land use regulations in favor of a single, unified form-based code that promotes smart growth. Specifically, this paper will argue that the SmartCode, a form- and transect-based code, should be adopted as an exclusive and mandatory code in the City of Atlanta.

Part I of the paper will look at the current Atlanta land use regulations – zoning ordinances, subdivision regulation and the comprehensive plan. The aim is to give the reader a sense of the current regulatory framework for land use in the City of Atlanta. Part II will briefly discuss the need for change and why the current land use regulations should be replaced with a
new exclusive and mandatory form-based code. Part III of the paper will introduce the reader to form-based codes. Part III will also discuss the benefits and disadvantages of form-based codes as well as common elements of form-based codes and the options available when choosing a form-based code. Because public participation is central to form-based codes, part IV will provide a history and overview of the Neighborhood Planning Unit, or NPU, system in Atlanta. It will then argue that the NPU system is well suited to act as the framework for the public participation component of any form-based code implementation. Part V will discuss calibrating SmartCode, the form-based code recommended for adoption by the City of Atlanta. In part VI, the paper will look at possible legal challenges that may arise in its application of the form-based code after its adoption.

Part I: The Current City of Atlanta Land Use Regulations

Zoning Ordinances

The City of Atlanta enacted its first zoning ordinance in 1922. It was around this time that comprehensive zoning, which “classified uses and created zones for all uses, which zones were then mapped, and … included height and bulk requirements,” was gaining popularity and spreading rapidly. It was with this 1922 zoning ordinance that the City of Atlanta laid the groundwork for the Euclidean zoning system that still exists in the city today. This system, which should be familiar to most of us, separates land uses based on their purpose – typically residential, commercial and industrial. In Atlanta these use zones, or districts, include, for example, R-1 Single-Family Residential District, C-1 Community Business District and I-1 Light Industrial District. Use zoning is still the primary tool that local governments use to regulate land use.
In 2000 and again in 2002 the City of Atlanta adopted the City of Atlanta Quality of Life Zoning Codes.\textsuperscript{viii} These parallel codes are an update of the Atlanta Zoning Ordinance and provide an alternative to conventional zoning districts. The Quality of Life Zoning Code was the result of collaboration between neighborhoods, businesses and those disappointed with the results obtained under the more conventional zoning code.\textsuperscript{ix}

The Quality of Life Zoning Code included a number of new zoning districts: Neighborhood Commercial (NC),\textsuperscript{x} Mixed Residential-Commercial (MRC),\textsuperscript{xi} Live Work (LW)\textsuperscript{xii} and Multi-Family Residential (MR).\textsuperscript{xiii} The updates to the code also included the addition or revision of several transit-oriented and Special Public Interest (SPI) districts.\textsuperscript{xiv} The new zoning districts were each designed to parallel one of the existing zoning districts and provide an alternative classification for use by developers (e.g. MRC in lieu of C-1, C-2 or C-3).\textsuperscript{xv}

The Quality of Life Zoning Code districts give developers the option to build pedestrian oriented, traditional buildings without being forced to go through a costly and time-consuming variance process.\textsuperscript{xvi} They also all share some basic urban design principles including, but not limited to, extensive sidewalk requirements, buildings that face and are visible from the street, and, in the case of parking decks, a design that hide automobiles.\textsuperscript{xvii} A main premise of the Quality of Life Zoning Code is mixed-use.\textsuperscript{xviii}

The Neighborhood Commercial (NC) district is designed to “restore, conserve and protect traditional neighborhood commercial districts at a scale and character which is in keeping with the surrounding neighborhoods, provide neighborhood oriented shops and services, and emphasize pedestrian convenience.”\textsuperscript{xix} These districts will likely serve no more than one or two neighborhoods due to size restrictions.\textsuperscript{xx}
The Mixed Residential Commercial (MRC) district aims to provide “an appropriate mix of residential with commercial uses along major corridors and ensure a pedestrian-oriented built environment.” It includes three density levels ranging from low to high to fit the conditions in various parts of the city.

The Live Work (LW) district gives residents an opportunity to operate small shops out of their homes while still maintaining a residential character in the district. According to the City the purpose of this district is to “support the rehabilitation or development of underutilized industrial and rail corridor areas adjacent to residential neighborhoods by allowing a mixture of uses at a scale and character which is appropriate for creating a live work environment.”

The Multi-Family Residential (MR) district allows for several density levels of multifamily housing. In addition, street-level commercial uses are allowed though they are limited by size, type and location. Finally, this district ensures that sufficient open space is provided for residents and that the environment is pedestrian friendly.

Special Public Interest (SPI) districts are used to tailor regulations to a specific area. The City notes that “[t]hese districts function to address special public interests to maximize a public investment made an in area.” Notable examples of SPI districts include the Downtown, Midtown and Buckhead/Lenox Station districts. In total there are 20 SPI districts in the City of Atlanta.

In order to entice developers to choose the Quality of Life Code over the conventional zoning code there are a number of incentives offered. These include bonus density incentives and exemption from parking requirements for certain developments under certain conditions. These incentives, not unlike those frequently offered under optional form-based codes, would
not be required if the Quality of Life Code were an exclusive and mandatory code or if a true form-based code were the only option.

**Subdivision Regulation**

In addition to the zoning ordinances mentioned above the Code of Ordinances of the City of Atlanta also contains a separate Land Subdivision Ordinance that regulates the subdivision of land.\(^{xxxv}\) These regulations govern the size and shape of lots,\(^{xxxvi}\) the development of public streets and sidewalks\(^{xxxvii}\) and the protection of trees and natural drainage ways.\(^{xxxviii}\) This separation of zoning and subdivision regulation is typical among most American jurisdictions.\(^{xxix}\)

It has been noted that “though [zoning and subdivision regulations] interact in the development of the built environment, today’s land development system artificially separates them into different ordinances”\(^{xli}\) and does not “emulate[] the actual development of the built environment.”\(^{xl}\) Under a unified form-based code zoning and subdivision regulations would be merged and separate regulations for each would no longer be necessary.\(^{xlii}\)

**Comprehensive Plan**

The City of Atlanta also maintains the Atlanta Strategic Action Plan (ASAP), which is the City’s version of a Comprehensive Development Plan (CDP).\(^{xliii}\) This document is required by the Georgia Planning Act of 1989\(^{xliv}\) and must be submitted in accordance with the Georgia Department of Community Affairs comprehensive planning rules, which were updated and expanded in 2005.\(^{xlv}\) Section 3-601 of the Charter of the City of Atlanta notes that the CDP shall “set forth the comprehensive development goals, policies and objectives for both the entire City and for individual geographic areas and communities within the City.”\(^{xlvii}\) In addition the plan needs to be updated every 3 to 5 years.\(^{xlvii}\)
Part II: The Need for Change

In the City of Atlanta, property owners, builders and developers currently have a choice between two competing zoning code systems when seeking to redevelop a piece of property. They can choose either the conventional zoning districts or the Quality of Life Zoning Code.

The downsides to conventional zoning are widely known and have been widely written about. These include the encouragement of sprawl through low-density single-use developments, the creation of automobile-dependent communities, the need for special districts (the SPI districts in Atlanta) to address areas outside the standard use zones and their complexity given most are written in “arcane language with complex mathematical formulas.”

Jane Jacobs in her 1961 classic *The Death and Life of Great American Cities* sums up the problems with conventional zoning when she writes:

[T]he greatest flaw in city zoning is that it permits monotony. Perhaps the next greatest flaw is that it ignores scale of use, where this is an important consideration, or confuses it with kind of use, and this leads, on the one hand, to visual (and sometimes functional) disintegration of streets, or on the other hand to indiscriminate attempts to sort out and segregate kinds of uses no matter what their size or empiric effect. Diversity itself is thus unnecessarily suppressed…

In fact, the City of Atlanta’s own Department of Planning and Community Development: Bureau of Planning notes that conventional zoning “perpetuates a disintegrating quality of life.” If the City of Atlanta itself feels that conventional zoning is so bad then why does it still offer this zoning code system as a choice? Part of the reason has to do with the fact that when the Quality of Life Zoning Code was being prepared there was not sufficient political will among city
leaders to replace the conventional zoning system.\textsuperscript{lv} Nor was there enough political will to make the parallel zoning system a true form-based code.\textsuperscript{lv}

To be fair, when adopting the Quality of Life Zoning Code the City was attempting to address some of the shortcomings of the conventional zoning system. According to the City the new zoning system seeks to:

- Improve the aesthetics of the built environment;
- Facilitate safe, pleasant, and convenient pedestrian circulation;
- Maximize pedestrian amenities, including open spaces, public art and public signage;
- Transition between densities to reinforce visual continuity, linkages, and existing street patterns;
- Provide multi-family housing that does not detract from adjacent single-family housing;
- Prevent encroachment of incompatible commercial uses and parking into neighborhoods;
- Encourage a compatible mixture of residential and commercial uses; and
- Encourage community oriented retail uses.\textsuperscript{lv}

At first glance these goals seem to encourage form-based development. One might ask then, why does the City need a new exclusive and mandatory form-based code?

While the Quality of Life Zoning Code is a step in the right direction it does not go far enough to address the issue of smart growth in the City of Atlanta. First, as noted in Part I, the Quality of Life Zoning Code is a parallel code that is optional. Other than the incentives that have been discussed, there is nothing driving developers to use one code system over the other. Second, the Quality of Life Zoning Code is still a use-based zoning system and not a true form-
based code. It has been said that the Quality of Life Zoning Code is 50-75% form-based but it does not go all the way in that it still retains elements that are not form-based. These include a primary focus on land use rather than form and a lack of regulations and standards keyed to specific locations on a regulating plan. Finally, there is an added administrative burden in maintaining multiple sets of regulations and special districts. Because of the interaction between zoning and subdivision regulations and the comprehensive plan, care must be taken to ensure any modification to one does not adversely affect the others. This could be avoided if a true form-based code were adopted as a number of these codes are “unified” and incorporate zoning, subdivision and other regulations into a single governing document.

Part III: An Introduction to Form-Based Codes

According to Douglas Porter’s book Managing Growth in America’s Communities, form-based zoning is “an emerging type of zoning aimed at creating a specific shape and structure of proposed development while allowing a fairly flexible mix of uses. Form-based zoning specifies building types, forms, and relationships to other buildings and streets and is typically applied to guide development of traditional neighborhood designs.” In short then, form-based zoning seeks to regulate based on the physical form and scale of buildings, streets, etc. with less emphasis on land use or the segregation of land uses, which is how conventional zoning systems regulate.

One of the main advantages to form-based zoning is the predictability that comes from development that occurs under form-based codes. Conventional zoning regimes work on a proscriptive basis, defining what is prohibited rather than what is desired. Conversely, form-based codes are prescriptive, describing what is allowed and what it should look like. This makes it easier for developers to determine, in advance, whether their plans will meet the criteria.
of the form-based code and also makes it easier for them to show communities that their plans conform to the community’s vision.\textsuperscript{lxv} This also helps cut down on costs by eliminating unnecessary redesigns and by reducing the amount of time needed to get through the approval process.\textsuperscript{lxvi}

Another advantage to form-based codes is the emphasis placed on public participation.\textsuperscript{lxvii} Advocates argue that by engaging citizens in the process early on, jurisdictions will see increased buy in and less resistance to form-based codes when they are adopted.\textsuperscript{lxviii} Through charrettes, a collaborative planning process that involves information gathering, design and review and a presentation phase,\textsuperscript{lxix} the public is directly involved in the creation of the plan for future development. As will be discussed in Part IV, the City of Atlanta seems well positioned to gather community input through the Neighborhood Planning Unit system currently used by the city.

Though there are a number of benefits to using form-based codes\textsuperscript{lx} there are also potential drawbacks. One is the political and legal problems that may arise if the form-based code is adopted as exclusive and mandatory for an entire jurisdiction.\textsuperscript{lxix} These problems often arise “because existing land use rights within the … area will be entirely replaced rather than merely supplemented”\textsuperscript{lxii} causing some to worry about the potential for legal claims against the jurisdiction.\textsuperscript{lxiii} As a result, most form-based codes adopted under an exclusive and mandatory format have been limited to certain defined areas within a jurisdiction.\textsuperscript{lxiv}

Another drawback is the potential watering down of the provisions in the form-based code in order to get it adopted. Because an exclusive and mandatory form-based code replaces existing land use rights “political realities may require increased deviations from the default provisions of the [code].”\textsuperscript{lxv} An example of this is Sarasota, Florida. To ensure the adoption of
a form-based code in Sarasota, Florida a number of modifications to the code were required. Examples of modifications include the elimination of requirements for terminated vistas, pedestrian passages, and civic reservation sites.

While these disadvantages can make the process of adopting and implementing a mandatory form-based code difficult in the beginning these challenges are not insurmountable. The strong focus on the charrette process and public participation should help mitigate, or fully eliminate, any backlash that may exist over this fundamental change to the existing zoning system. Further, education about the process is a key component to help “reduce conflict, misunderstanding and the need for hearings as individual projects are reviewed.”

Elements of a Form-Based Code

According to the Form-Based Codes Institute, form-based codes commonly include (but do not necessarily include) the following elements:

• *Regulating Plan*. A plan or map of the regulated area designating the locations where different building form standards apply, based on clear community intentions regarding the physical character of the area being code [sic].

• *Public Space Standards*. Specifications for the elements within the public realm (e.g., sidewalks, travel lanes, on-street parking, street trees, street furniture, etc.).

• *Building Form Standards*. Regulations controlling the configuration, features, and functions of buildings that define and shape the public realm.

• *Administration*. A clearly defined application and project review process.

• *Definitions*. A glossary to ensure the precise use of technical terms.

There are also optional elements that may be included and regulate areas such as landscaping, signage or environmental resources.
Options for Form-Based Codes

Once a jurisdiction has made the decision to adopt a form-based code they need to decide on the details for implementation. The two options are: draft the code from scratch or use a model ordinance as a template and modify it to fit the local conditions. For most jurisdictions, starting with a template is usually preferable to creating something from scratch. This is evidenced, in part, by the number of jurisdictions that have adopted, or are in the process of adopting, a model form-based code known as the SmartCode.\textsuperscript{lxix} The SmartCode is perhaps the most well known example of a model form-based code. According to the SmartCode:

[It] is a form-based code that incorporates Smart Growth and New Urbanism principles. It is a unified development ordinance, addressing development at all scales of design, from regional planning on down to the building signage. It is based on the rural-to-urban transect rather than separated-use zoning, thereby able to integrate a full range of environmental techniques. Because the SmartCode envisions intentional outcomes based on known patterns of urban design, it is a more succinct and efficient document than most conventional codes.\textsuperscript{lxii}

Since the SmartCode is open-source, and therefore free to use, and a unified ordinance, replacing zoning, subdivision and a number of other regulations, it is an ideal alternative for a jurisdiction that is looking to get rid of their conventional zoning system and replace it with a form-based code.\textsuperscript{lxiv}

The SmartCode is also a transect-based code.\textsuperscript{lxv} While transects were originally associated with the natural environment\textsuperscript{lxvi} they have been adapted to the built environment.\textsuperscript{lxvii} In the SmartCode, transects are divided into six zones called “T-Zones”\textsuperscript{lxviii} The lowest density is delineated “T1 – Natural Zone” whereas the highest density is “T6 – Urban
A “Civic Zone” and “Special Districts” are also available for special uses where none of the other transect zones would be appropriate. According to SmartCode Central, “[t]he Transect ensures that a community offers a full diversity of building types, thoroughfare types, and civic space types, and that they have characteristics appropriate to their locations in the environment.” The use of transects will be important in any form-based code implementation in Atlanta since the city contains areas that fit into most, if not all, of the T-Zones contained in the SmartCode.

Part IV: The City of Atlanta’s NPU System: A Framework for Public Participation

As has been discussed in Part III one of the major tenets, and benefits, of a form-based code is public involvement and participation used to meet the community’s vision for what future development should look like. This process must start early and jurisdictions need to have an effective framework in place to ensure adequate participation in the development of the form-based code. Prior to discussing the form-based code best suited for the City of Atlanta, an overview of the City’s Neighborhood Planning Unit, or NPU, system will be provided. This system encourages participation in the planning and zoning process and could serve as the framework for public participation. For those readers unfamiliar with the City of Atlanta’s NPU system the history, an overview and some criticisms of the system will be provided.

History of Atlanta’s NPU System

The foundation for Atlanta’s Neighborhood Planning Unit system was put in place in March 1973 when the General Assembly approved a new city charter for Atlanta. The new charter required the City to produce a comprehensive development plan (CDP) – now known as the Atlanta Strategic Action Plan (ASAP) – which “set forth the comprehensive development goals, policies and objectives for both the entire City and for individual geographic areas and...
communities within the City.”

It also set forth a framework for citizen participation in their communities. Article B – Neighborhood Planning of the Atlanta City Code, which addresses the subject of “Neighborhood Planning”, notes that “[i]t is the purpose of this article to provide an opportunity both for the citizenry formally to provide input into the comprehensive development plan of the city and to provide a means by which information concerning the operation of city government can be provided to the citizens of Atlanta.”

In August 1974, the Neighborhood Planning Ordinance was adopted by City Council and approved by the Mayor, Maynard Jackson. The 1974 ordinance permitted the creation of neighborhood planning units (NPUs) and neighborhood planning committees (NPCs). The NPU boundaries were adopted by the City in May 1975. There are currently over 240 official neighborhoods in 25 NPUs. NPUs are not given any funding by the City for supplies or other needs.

**Operation of the NPU System**

The City of Atlanta’s Department of Planning and Community Development is responsible for designating the NPU boundaries. Further, the Bureau of Planning, the entity within the Department responsible for the NPUs, is required to provide information to them on a variety of areas including land use, transportation, housing and open space to help the NPUs in their neighborhood planning activities. These planning activities include reviewing rezoning applications, requests for variances and amendments to ASAP.

NPUs meet monthly to discuss and vote on issues affecting, both directly and indirectly, their particular planning unit. Typical items for discussion at a NPU meeting include the planning activities listed above as well as updates by various city departments including Watershed Management, Police and Fire. After discussion, and for those items requiring a
vote (typically a rezoning), the NPU either votes or defers action to a future meeting. If a vote is taken, the results are ultimately submitted to the City Council, or other appropriate city agency, which makes the final determination regarding the matter.\textsuperscript{cv} It is important to note that the NPU votes are only advisory, though highly persuasive, and that the City Council, or other appropriate city agency, is free to accept or reject the NPU’s vote when the matter comes before it.

The monthly NPU meetings are also attended by the City of Atlanta Planner assigned to the NPU. The Planner’s responsibilities include recording official votes, responding to questions related to land use and zoning, and presenting items sent by the City government for NPU review.\textsuperscript{cvi} Other than the assigned Planner, NPUs are comprised entirely of volunteers.

It should also be noted that a large amount of flexibility exists within the NPU system. For example, each NPU is entitled to create its own bylaws.\textsuperscript{cvii} The only requirements are that the bylaws must be submitted to the Bureau of Planning by September 30 of each year; that the bylaws are voted on once a year; and that each resident in attendance at the meeting where the bylaws are voted on is allowed to vote.\textsuperscript{cviii} Also, some NPUs permit anyone to vote while other NPUs operate in a representative fashion with only elected neighborhood representatives voting on the issues.\textsuperscript{cix} This flexibility seems to serve the NPU system well, especially given the unique characteristics and demographics of each planning unit.

Each NPU also sends a representative (typically the NPU Chairperson) to the Atlanta Planning Advisory Board (APAB). The Board’s primary mission is to facilitate citizen participation in affairs of city government by drawing on its representation from the NPU system and elsewhere.\textsuperscript{cx} APAB is “a representative Board of citizens drawn from every district of Atlanta that advises the City Administration, City Council and others on citywide issues, goals and objectives relative to Atlanta's Comprehensive Development Plan and related concerns.”\textsuperscript{ncxi}
Criticism of the NPU System

Although the NPU system is generally viewed favorably, it faces criticism. One of the main criticisms is that the NPUs are not democratic in practice but are in fact run by small groups of homeowners who are not always representative of the larger planning unit. Another criticism is that NPUs often get involved in, and voice their opinions about, non-neighborhood issues (i.e. issues that do not affect their own NPU but are not considered citywide issues either). Perhaps the most well known recent example involves the controversy surrounding the Piedmont Park parking deck. There, most every NPU in the city (as well as numerous other groups) ended up taking a stand against the parking deck even though, arguably, the issue did not have much effect beyond the borders of NPU-E where Piedmont Park is located. It should be noted, however, that other NPUs may have inserted themselves into the park controversy because they saw the issue as one that might set a precedent going forward and they wanted to make sure that if it did in fact become precedent that they were a part of it.

The NPU System as a Framework for Public Participation

Although the NPU system in the City of Atlanta is not perfect, it will serve as a useful framework for the charrette process, which will help in the formulation of consensus among the various stakeholders who include, among others, residents, business owners, local, city and state officials, developers and builders.

In order to fully utilize the NPU system as a framework for the charrette process, very few modifications will need to be made. First, many of the stakeholders mentioned above regularly attend NPU meetings and are already a part of the communication network that has been established. As such, they will likely continue attending NPU meetings to discuss implementation of a form-based code once it is added to the agenda. Next, the NPU system
currently divides the City into 25 units. These well established units are appropriately sized so that they do not cover too large an area. During the charrette process, this will help ensure that stakeholders who attend these meetings are engaged since they are most likely active participants in the community. The current unit boundaries should also prove useful when, further in the process, the community scale of the form-based code and the T-Zones are addressed. Finally, NPUs meet on a regular schedule and in regular locations. This is useful since most stakeholders are familiar with their NPUs schedule thereby minimizing conflicts and also the meeting locations, which are usually centrally located and easily accessible. While the NPU meetings will need to serve a dual-function while the charrette process is ongoing once it is complete they can easily revert to their old agendas of city department reports and zoning issues.

Part V: A Form-Based Code for Atlanta: Calibrating the SmartCode

Due to its popularity, ability to be easily modified to fit local conditions and use of transects, the City of Atlanta should chose the SmartCode as the foundation for their exclusive and mandatory form-based code. However, in order to use the SmartCode it must first be calibrated to fit the City. It should be noted that what follows is a summary of the calibration process and that should the City of Atlanta ever decide to implement a plan of this magnitude a more in-depth calibration process will need to be undertaken.

To calibrate the SmartCode to fit the City of Atlanta, there are a number of steps that must be carried out. Some steps are made easier in that the SmartCode itself highlights those sections of the code that require modification. Beyond those highlighted sections, however, the SmartCode must also be legally calibrated to ensure that it complies with federal, state and
local law. Failure to properly calibrate the code could result in the adoption of a SmartCode that is legally unenforceable.\textsuperscript{cxxi}

There are a number of methods to calibrate the SmartCode. Chad Emerson has outlined one such method in his article \textit{Making Main Street Legal Again: The SmartCode Solution to Sprawl}.\textsuperscript{cxxii} He suggests a five-step process that municipal bodies may follow to create a legally enforceable locally calibrated code:

1. Determine the Local Format for Implementing the SmartCode;\textsuperscript{cxxiii}
2. Depending on the Selected Format, Determine What Parts of the SmartCode Will be Adopted;\textsuperscript{cxxiv}
3. Identify Federal and State Laws that May Affect a Locally Calibrated SmartCode;\textsuperscript{cxxv}
4. Identify Local Laws Outside the Existing Zoning Regulations that May Be Preempted by the SmartCode;\textsuperscript{cxxvi}
5. Legally Calibrate the SmartCode Template to Local and State Law.\textsuperscript{cxxvii}

This is only one approach to legally calibrating the SmartCode to fit the local conditions. This approach was chosen due to its ease of application and because of its comprehensiveness. By properly calibrating the code prior to implementation legal disputes can be avoided, or at least reduced.

\textbf{Step 1: Determine the Local Format for Implementing the SmartCode}

The City of Atlanta should adopt any unified form-based code as the exclusive and mandatory format such that the existing zoning system is replaced in its entirety. This may, however, create political and legal problems in the implementation of the code.\textsuperscript{cxxviii} Such challenges will include convincing the public that a higher density more public lifestyle is preferable to a low density private lifestyle\textsuperscript{cxxix} and educating the community to dispel the myth
that approved projects under conventional zoning will need to be approved again.\textsuperscript{cxxx} Two of the benefits of the exclusive and mandatory format are that it promotes traditional neighborhood development, which will help Atlanta prevent development patterns it does not want, and that it requires those involved to only know one system.\textsuperscript{cxxxi}

\textbf{Step 2: Depending on the Selected Format, Determine What Parts of the SmartCode Will be Adopted}

The SmartCode is comprised of seven articles. It also includes modules that supplement the articles and may be added as needed.\textsuperscript{cxxxii} Some of the articles within the SmartCode are mandatory while others are optional and may or may not be included depending on the needs of the jurisdiction.

Articles 1, 6 and 7 are mandatory for all SmartCode formats and contain provisions for the implementation, authority and purpose of the SmartCode, the diagrams and tables that support the other Articles and the terms and definitions that support the other Articles, respectively.\textsuperscript{cxxxiii} As such they should be adopted making only those changes necessary to calibrate them to fit the conditions in the City of Atlanta.

Article 2 describes the implementation of the regulating plan on a regional scale.\textsuperscript{cxxxiv} Since the City of Atlanta will be adopting the SmartCode jurisdiction-wide this Article should be calibrated and included in the final code.

Article 3 prescribes the requirements for Greenfield plans and is generally included in any SmartCode implementation unless the code provides that only infill properties are eligible.\textsuperscript{cxxxv} As the City is adopting this plan jurisdiction-wide, and it is not limited to infill properties this Article should be included.
Article 4 prescribes the Infill requirements and, in the case of Atlanta, must be included since most, if not all, of the City’s development is expected to be infill development.

Article 5 prescribes lot and building standards and codifies the regulatory standards for landscaping, building function and building configuration, among others. This article, while not mandatory, should be adopted under all formats.

Step 3: Identify Federal and State Laws that May Affect a Locally Calibrated SmartCode

It is well established in American jurisprudence that, in general, subdivisions of the state (i.e. a city or other municipality) may not enact laws that contradict state law and, in turn, states may not enact laws that contradict federal law. As such, any form-based code adopted in the City of Atlanta must be legally calibrated to existing federal and state law.

Federal Law

In general, the model SmartCode has already taken into account potential conflicts with federal law. That said, a few potential areas of concern still exist. One area in particular is compliance with building requirements in the flood zone maps produced by the Federal Emergency Management Authority (“FEMA”).

State Law

There appear to be two issues that may arise under state law when adopting the SmartCode. The first is whether state law permits a local jurisdiction to adopt a form-based code. In this regard, it is essential to note that Georgia follows home-rule. Under the Georgia Constitution all zoning rights not expressly reserved by the state are conferred upon local governments. Georgia’s home-rule exists in contrast with Dillon’s Rule, in which all zoning rights not expressly or impliedly granted to local governments, or essential to accomplish the declared objectives of local governments, are reserved by the state. Under home-rule, units
of local government in Georgia retain broad discretionary power in zoning at the local level. Pursuant to the Rules of the Department of Community Affairs, local governments are required to prepare and implement comprehensive planning. The City of Atlanta should note, however, that even where zoning power is authorized by home-rule, such authorization only extends to matters not in conflict with state law. The only possible conflict here would be if ASAP contained language prohibiting or limiting the city from adopting a form-based code. Currently in the City of Atlanta the opposite is true. Section 3: Community Assessment of ASAP discusses in some length encouragement of traditional neighborhood development patterns and other form-based code ideals. Should the City of Atlanta wish to make it clear form-based codes are allowed, an amendment to ASAP could be made.

The other issue is whether existing state laws might preempt portions of the code. One area where this can arise is during school planning, as state law may require minimum school acreage in excess of what is required under the SmartCode. This does not appear to be a major problem in Georgia, however, as the state Department of Education Facilities Services Unit’s A Guide to School Site Selection, notes that “[i]n developed areas, deviations from the minimum acreage requirements may be made by the site approval committee if the reduced acreage is considered appropriate.”

Step 4: Identify Local Laws Outside the Existing Zoning Regulations that May Be Preempted by the SmartCode

The SmartCode is a “unified” ordinance. Therefore, in certain situations, it regulates matters not covered in a conventional zoning regime. Many jurisdictions, including the City of Atlanta, have zoning ordinances and subdivision regulations. The SmartCode, on the other hand, consolidates these regulations into a single ordinance. As such, and before adoption of
the SmartCode, the City will need to ensure “1) That [the] state enabling act permits the 
integration of zoning and subdivision regulations into a single ordinance; and, 2) That, when 
legally calibrating the SmartCode, both the resolution adopting the SmartCode and the 
SmartCode itself clearly and unambiguously mandates this consolidated result.”

Reviewing the Georgia Planning Act of 1989 there does not appear to be any 
prohibition on the integration of zoning and subdivision regulation. As such, this should not be 
an issue for the City of Atlanta. The second step could also be dealt with through a resolution 
adopted by the City Council stating the consolidated result is the intended consequence.

Step 5: Legally Calibrate the SmartCode Template to Local and State Law

Once steps one through four have been completed, and because the SmartCode is a model 
ordinance it must be “customized” to the City of Atlanta prior to adoption. The first step is to 
review, and modify if necessary, any highlighted language to ensure it complies with state and 
local law.

Once this has been completed, there are two additional steps in the legal calibration 
process: 1) calibration of legal enforceability and 2) calibration for legal terminology. The first 
of these two steps involves taking all the federal and state laws from Step 3 that apply to the City 
of Atlanta and adjusting the SmartCode to bring it into compliance with these laws. The 
second step involves reviewing the terms and definitions used in Article 7 of the SmartCode and 
making any necessary adjustments to ensure that they are aligned with any other existing land 
development definitions in the City of Atlanta regulations. This will help avoid confusion, 
and possible legal challenges, when the same term is used in a different manner in other parts of 
the City of Atlanta regulations.
As noted at the outset the method described above is but one method of legally calibrating the SmartCode to fit the local jurisdiction. Regardless of whether or not this particular method is used in the City of Atlanta they must take care to legally calibrate the SmartCode to comply with federal, state and local law. This is critical to minimizing the number of legal challenges against the code and mitigating the possibility that any of those challenges is successful.

Part VI: Legal Issues in the Application of the SmartCode

There are a number of potential legal issues that may arise in the application of the SmartCode. Though most of these issues will not arise until after the SmartCode has been adopted they are worthy of consideration from early on in the implementation process. This will allow the City, during the charrette process, to educate stakeholders about these issues and to hopefully minimize any legal challenges after the code has been adopted. Legal issues reviewed for this case include substantive due process, procedural due process and takings. A note about consistency between the City of Atlanta’s ASAP and the SmartCode regulating plan will also be discussed.

Substantive Due Process

Like any regulation of land, form-based codes must satisfy the requirements of substantive due process.\textsuperscript{clxiii} Since such regulation is essentially an exercise of the police power, form-based codes must advance legitimate governmental interests that serve the public health, safety, morals and general welfare.\textsuperscript{clxiv} Legal issues with form-based codes can arise, however, when form-based regulation is characterized as mere aesthetic regulation. Since the majority of United States jurisdictions now accept aesthetic considerations as a proper exercise of the police power these regulations are often afforded a presumption of validity.\textsuperscript{clxv} The test for substantive
due process is best summarized in the following two-step analysis: (1) “whether the regulation advances a legitimate governmental interest;” and (2) whether “the regulation is a reasonable means to achieve that goal.”

To satisfy the substantive due process requirement for its SmartCode, the City of Atlanta will need to draft a clear stated purpose for the Code to demonstrate that it is a legitimate exercise of the City’s police power. An express purpose indicating that the Code is calculated to serve the health, safety, morals and general welfare of the community can help to satisfy the first prong of the substantive due process analysis and avoid a facial challenge to the Code. Further, clear definitions of key terms in the Code will be essential to avoid a void-for-vagueness claim as many terms associated with form-based codes are subject to multiple interpretations leaving room for a vagueness challenge.

Other substantive due process challenges to form-based land regulations can arise in the application of the regulations. These “as applied” challenges typically center on the second prong of the substantive due process analysis and focus on whether the regulation at issue is a reasonable means to achieve its lawful stated purpose. Here, the basis for the challenge is its arbitrary and capricious application to a particular site. Once again, clearly defined terms and a clearly stated purpose can help avoid a challenge for arbitrary application and demonstrate the reasonableness of the code. In these instances, a form-based code’s reasonableness may be determined by a balancing of interests, weighing private loss against the public benefit of the regulation at issue. The more clearly defined and clearly stated the purpose, the more reasonable the regulation.

Procedural Due Process
Where substantive due process relates to “the clarity and scope of regulations”,
procedural due process is about fairness in the application of the law. In the context of land
use regulation, satisfying procedural due process requires the presence of safeguards to ensure
that local decision-making bodies make their decisions in a fair and equitable manner. If the
local governing body exercises such safeguards, as required by law, courts will generally uphold
the fairness of the disputed decision-making process.

In implementing its SmartCode, the City of Atlanta will need to ensure, at a minimum,
that such safeguards exist to entitle affected parties to notice of hearings held to consider
decisions regarding the SmartCode. This should not be an issue since the City of Atlanta already
has procedures in place regarding action on zoning issues. Further, these procedures, with
minor adjustment, should be able to be carried over once the new ordinance goes into effect.

The City of Atlanta should note that the basis for any decisions made regarding the
SmartCode should be clearly and unequivocally stated. Because form-based codes are generally
more susceptible to procedural due process challenges than traditional zoning ordinances any
permit denials under the code should find their basis in a specific code provision, if at all
possible. One way to minimize the threat of procedural due process challenges under a
form-based code would be to employ a planning staff with expertise in architecture and urban
design to assist local decision makers.

Takings

No legal analysis of a proposed land use regulation is complete without the consideration
of takings. Often regarded as the most contentious constitutional land use issue, takings involve
the reach of the Fifth Amendment to the United States Constitution which states “nor shall
private property be taken for public use, without just compensation.” It is well established in
American jurisprudence that the regulation of land, if it goes “too far,” can constitute a taking in and of itself.\textsuperscript{clxxvii} There are also other ways a takings can occur including through eminent domain,\textsuperscript{clxxviii} a permanent physical occupation\textsuperscript{clxxix} or an exaction.\textsuperscript{clxxx} The aforementioned notwithstanding it has been noted that “the Takings Clause of the Fifth Amendment does not present a substantial obstacle to the adoption of form-based codes.”\textsuperscript{clxxxi} Further, courts have to-date resisted takings challenges against smart-growth measures, which are often times implemented through form-based codes.\textsuperscript{clxxxii}

One issue that might complicate the City’s efforts to adopt a form-based code is a recent Senate Resolution that the Georgia General Assembly has recently considered a Constitutional amendment that would require a governmental entity to make “payment of just and adequate compensation [due to a takings resulting] from unreasonably burdensome governmental actions.”\textsuperscript{clxxxiii} While this legislation has been inactive since the 2006 Legislative Session it could be revived at any time. It is unclear what effect this legislation could have on land use regulations like the form-based code the City of Atlanta proposes to implement since “unreasonably burdensome governmental action” is not defined. Though the likelihood that this will affect the City’s plan seems remote, it is still an issue worth carefully considering.

\textbf{ASAP and the SmartCode}

Another consideration when adopting a form-based code is consistency between the City’s comprehensive plan, ASAP, and the new regulating plan, which is “the key to the entire [form-based code] process.”\textsuperscript{clxxxiv} The City of Atlanta has an extensive comprehensive plan that has been created based on the guidelines set forth by the Department of Community Affairs.\textsuperscript{clxxxv} Therefore, any form-based code the City implements should correspond directly to the existing comprehensive plan. In some states, Georgia excluded, regulatory consistency with
comprehensive plans is mandatory. Despite the fact that the City is not required to maintain consistency between the two documents, it is recommended. Consistency is particularly useful in that it can help eliminate confusion among the various stakeholders. It may also help minimize legal challenges since, if the plans are consistent, there should be no differences between them that could form the basis for a legal challenge.

To avoid any challenges, legal or otherwise, over the consistency between the comprehensive plan and the regulating plan the City of Atlanta should ensure that the SmartCode as adopted is consistent with the comprehensive plan and that the two documents “work together and mirror one another.”

Part VII: Conclusion

To some, the recommendation to switch to an exclusive and mandatory unified form-based code in the City of Atlanta may seem a bit radical, but it is not unprecedented. It would be naïve to think that the switch to a new land development will be easy for a large city like Atlanta. There are a number of administrative, political and legal obstacles that must be overcome. Numerous cities around the United States – perhaps most notably Miami, Florida – and the world, have already taken the leap to implement this new vision for the future. At this point in our country’s history, and specifically for the City of Atlanta’s, the time is right for a major change in the approach to zoning and other land use regulations. The switch to an exclusive and mandatory unified form-based code will position the City of Atlanta at the forefront of a new movement in land use planning that will serve it well for generations to come.

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1 Shedrick Harrison, Jr., Opinion, Guest Column, Another View: Working Together, We can Find Smart Solutions to our Traffic Woes, ATLANTA J. CONST., Feb. 22, 2009, at A17 (traffic congestion); Rob Hunter & Jeff Seabright, With Lake Tapped Out, We Can’t Just go with the Flow, ATLANTA J. CONST., Jan. 2, 2009 , at A12 (water crisis)


Atlanta Code of Ordinances, *supra* note iv, at Sec. 16-11.

*Id.* at Sec. 16-16.

Juergensmeyer & Roberts, *supra* note iii, at 70.

Atlanta Code of Ordinances, *supra* note iv, at Sec. 16-32 to -35.


Atlanta Code of Ordinances, *supra* note iv, at Sec. 16-32.

*Id.* at Sec. 16-34.

*Id.* at Sec. 16-33.

*Id.* at Sec. 16-35.

*Id.* at Sec. 16-18.

City of Atlanta, *Quality of Life Zoning Codes* [hereinafter QOL], http://www.tunspan.com/westlake/docs/COA%20QOL%20zoning.pdf (last visited Apr. 29, 2009).


TSW QOL, *supra* note xvi.

Programs & Initiatives, *supra* note xvii.

TSW QOL, *supra* note xvi.

Programs & Initiatives, *supra* note xvii.

*Id.*

TSW QOL, *supra* note xvi.

Programs & Initiatives, *supra* note xvii.

TSW QOL, *supra* note xvi.

Programs & Initiatives, *supra* note xvii.

*Id.*
xxviii *Id.*

xxix *Id.*

xxx Atlanta Code of Ordinances, *supra* note iv, at Sec. 16-18A, -18C & -18L.

xxxi Atlanta Code of Ordinances, *supra* note iv, at Sec. 16-18A to -18V.

xxxii PROGRAMS & INITIATIVES, *supra* note xvii.

xxxiii *Id.*


xxxv Atlanta Code of Ordinances, *supra* note iv, at Sec. 15-01.001 et seq.

xxxvi DOUGLAS R. PORTER, MANAGING GROWTH IN AMERICA’S COMMUNITIES 41 (Island Press 2008).

xxxvii *Id.* at 41; Atlanta Code of Ordinances, *supra* note iv, at Sec. 15-01.001 et seq.

xxxviii PORTER, *supra* note xxxvi, at 41; Code of Ordinances, *supra* note iv, at Sec. 15-01.001 et seq.


xl *Id.*

xli *Id.*


xliii ASAP, *supra* note ii.


xlvi 1996 Ga. Laws 4469 (specifically Sec. 3-601).

xlvii *Id.*


1 *Id.*


lii QOL, supra note xv.

lv Interview with Aaron Fortner, Principal, Market + Main, Inc., in Hapeville, GA (Mar. 5, 2009).

lv Id.

lv QOL, supra note xv.

lvii Aaron Fortner, supra note liv.

lvi These elements were adopted from the Form-Based Codes Inst., Checklist for Identifying and Evaluating Form-Based Codes, http://www.formbasedcodes.org/checklist.html (last visited Apr. 24, 2009).


lviii Local Government Commission, supra note lxvi, at 1.


lxi Readers who wish to learn more about the advantages of form-based codes should review “Eight Advantages to Form-Based Codes” available from the Form-Based Codes institute, http://www.formbasedcodes.org/advantages.html (last visited Apr. 29, 2009).


lxvi Readers who wish to learn more about the advantages of form-based codes should review “Eight Advantages to Form-Based Codes” available from the Form-Based Codes institute, http://www.formbasedcodes.org/advantages.html (last visited Apr. 29, 2009).


lxviii LGC, supra note lxvi, at 1.


lxx John M. Barry, Note, Form-Based Codes: Measured Success Through Both Mandatory and Optional Implementation, 41 CONN. L. REV. 305, 333 (2008).


lxxi Readers who wish to learn more about the advantages of form-based codes should review “Eight Advantages to Form-Based Codes” available from the Form-Based Codes institute, http://www.formbasedcodes.org/advantages.html (last visited Apr. 29, 2009).

lxxi Emerson, supra note xxxix, at 671.

lxxii Id.
See Part VI for an in-depth discussion of the legal claims that may arise.

Emerson, supra note xxxix, at 671. This was the case in both Petaluma, CA where a form-based code was adopted for a 400-acre redevelopment adjacent to its downtown and Sarasota, FL where a form-based code was adopted for parts of its downtown area.

Emerson, supra note xxxix, at 671.

Id.


LOCAL GOVERNMENT COMMISSION, supra note lxvi, at 1.

The Form-Based Codes Institute (FBCI) was formed in 2004 by practitioners in urban design, planning, architecture, public policy, and law to consider various aspects of this emerging regulatory technique. See Form-Based Codes Inst., http://www.formbasedcodes.org/index.html (last visited Apr. 29, 2009).

DEFINITION OF A FORM-BASED CODE, supra note lx.

Id.

According to the SmartCode Version 9.2 Introduction it has been calibrated (i.e. adopted) in over 100 American jurisdictions as of early 2009 and more than 25 adoptions are in progress. See SMARTCODE, supra note lix, at iv.

Id.

Id.; THE SMARTCODE, supra note xlii.


Andres Duany, Introduction to the Special Issue: The Transect, 7 J. URB. DESIGN 251, 254 (2002).

ALL ABOUT THE CODE, supra note lxxxv.

THE SMARTCODE, supra note xlii.

Id.

SMARTCODE, supra note lix, at xi.

THE SMARTCODE, supra note xlii.


ASAP, supra note ii, at 7.

1996 Ga. Laws 4469 (specifically Sec. 3-601).

NPU-D, supra note xcii.
xcvi Atlanta Code of Ordinances, supra note iv, at Sec. 6-3011 et seq.

xcvii NPU-D, supra note xci.

xcviii Neighborhood Planning Ordinance of 1974

xcix NPU-D, supra note xci.


ci Atlanta Code of Ordinances, supra note iv, at Sec. 6-3013(a).

cii Id. at Sec. 6-3013(b).

ciii Id. at Sec. 6-3013(c).


cvi This is based on the author’s personal experience in attending numerous NPU meetings.

xcvi Atlanta Code of Ordinances, supra note iv, at Sec. 6-3016.

cviii Id.

cix Interview with Shelley Peart, Planner, City of Atlanta, in Atlanta, GA (Apr. 7, 2009).


cxi Id.

cxii Telephone interview with Eric Ranney, Chair, NPU-C, in Atlanta, GA (Jan. 16, 2009); see also Editorial, Citizen Groups Should Approve Projects on Merits, not Bribes, ATLANTA J. CONST., Sept. 12, 1990, at A14 (discussing how NPUs have, at times, been known to require “donations” for project approvals).


xcvi Neighborhood Planning Units, supra note xci.
The SmartCode, supra note xlii.

NPU Meeting Times, Places, and Current Agendas, supra note civ.

See Segedy & Johnson, supra note cxvii (noting that when planning charrettes efforts should be made to choose dates that avoid conflict and locations that are easily accessible and centrally located).

SmartCode, supra note lix, at iv.

Id. at xiii (noting that calibration should be done with the advice of land use attorneys, among others, familiar with the SmartCode).

Emerson, supra note xxxix.

Id. at 670.

Id. at 675.

Id. at 677.

Id. at 682.

Id. at 684.


Barry, supra note lxv, at 329.

Id. at 329-30.

Hurley, supra note cxviii.

SmartCode, supra note lix, at xii.

Id. at xii; Emerson, supra note xxxix, at 675-676.

SmartCode, supra note lix, at xii; Emerson, supra note xxxix, at 676.

SmartCode, supra note lix, at xii; Emerson, supra note xxxix, at 676.

SmartCode, supra note lix, at xii; Emerson, supra note xxxix, at 676.

Emerson, supra note xxxix, at 677.

U.S. Const. art. VI, cl. 2.

Emerson, supra note xxxix, at 678.

Id.

Id.
Emerson, supra note xxxix, at 680.

GA. CONST. art. IX, §2, para. 4.

JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS, §237 (5th ed. 1911).

GA. COMP. R. & REGS., § 110-3-2-.01 et seq. (2009). It is interesting to note, however, that despite the “authority” of the DCA to regulate in this area the Ga. Code notes, “[n]othing in this Code section shall limit or compromise the right of the governing authority of a county or municipality to exercise the power of zoning.” See O.C.G.A. § 50-8-37(h) (2008).

JUERGENSMEYER & ROBERTS, supra note iii, at 51.

ASAP, supra note ii, at 14-6.

Emerson, supra note xxxix, at 681.

Id.

GEORGIA DEPARTMENT OF EDUCATION FACILITIES SERVICES UNIT, A GUIDE TO SCHOOL SITE SELECTION 3 (Georgia Department of Education 2003), http://www.doe.k12.ga.us/_documents/schools/facilities/site2_a.pdf.

SMARTCODE, supra note lix, at iv.

Emerson, supra note xxxix, at 682.

Atlanta Code of Ordinances, supra note iv, at Sec. 16.

Atlanta Code of Ordinances, supra note iv, at Sec. 15.

Emerson, supra note xxxix, at 682.

Id.


Emerson, supra note xxxix, at 684.

Id.

Id. at 685.

Id.

Id. at 685-6.


Id.

Id.; see also Garvin & Jourdan, supra note lxiii, at 411-2.


*Id.*

*Id.* at 412.

*Id.*

*Id.* at 415.

*Id.*

Atlanta Code of Ordinances, *supra* note iv, at Sec. 16-30.001 et seq.

*See* Garvin & Jourdan, *supra* note lxiii, at 416 (noting that decisions under traditional zoning ordinances are tied to specific provisions in the ordinance leaving little room for discretion whereas form-based codes are more flexible and therefore susceptible to litigation).

*Id.* at 416-7.

U.S. CONST. amend. 5 (The Takings Clause applies to the states through the Fourteenth Amendment’s due process requirement).

*See* Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922).


*Id.* at 416.


Garvin & Jourdan, *supra* note lxiii, at 419.

ASAP, *supra* note ii.

*Id.*

Garvin & Jourdan, supra note lxiii, at 419.

Miami 21 likely the most notable example in the US, and the most comparable to Atlanta. See The City of Miami, Miami 21, http://www.miami21.org/index.asp (last visited Apr. 29, 2009).