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Buffalo's Green Code: Opportunities and Challenges

Introduction

I currently live in South Buffalo, which some of its residents might tell you is a city unto itself. A college student, I have previously lived in the University Heights and North Buffalo areas as well prior to my return. South Buffalo's favorite son, my wife and I took up residence five blocks from where I grew up, off of Seneca Street, one of the area's major arterial streets. There is a small store down the street where we might procure most of the things we need on a daily basis, and it includes an attached chain coffee shop. The store serves as sentinel, standing guard at the entry point for the neighborhood's commercial district. We occasionally frequent other establishments in the area; there are some nice restaurants, a laundromat, more than a few bars, and various other corporate entities.

Still, the neighborhood could stand to be more welcoming and user friendly. It is well served by one of the city's bus routes, and is largely walkable. Traffic is heavy though, and the street feels cramped, making a dangerous gamble of alternate forms of transportation, such as cycling. More than a few lots are vacant, many storefronts stare blankly into the street, and still others open their parking lots before their arms to customers. A tree grows in South Buffalo, trees actually, but along Seneca Street they are few and lonely.

The neighborhood is a microcosm of Buffalo itself. Vibrant enclaves persist, to be sure, while other neighborhoods appear poised to realize their potential. Unfortunately, the city as a whole is depleted. It's depleted economically; Buffalo's unemployment rate was 8.8% in

February 2011.¹ A sign of both economic and social depletion, the city has lost more than 30,000 residents in the past decade as citizens fled for the suburbs and different cities altogether, according to state census figures, highlighting widespread, visible vacancies.²

Residents not only find it hard to remain employed; they find it hard to be healthy. Just outside the city, Tonawanda Coke, a coke manufacturing plant, was recently cited for releasing elevated levels of cyanide into the Town of Tonawanda's sewer system, which ultimately discharged the toxic contents into the Niagara River.³ The citation follows previous sanctions regarding excessively high levels of carcinogenic benzene.⁴ Health concerns extend not only to exposure to deadly chemicals, but also to social wellbeing, where Buffalo could use improvement. For example, while the city is highly ranked regarding the amount of time its residents spend in cars, it is also a car dependent region; Buffalo's "green commuter ranking" is 35th among the 60 largest metropolitan areas nationwide.⁵

These issues are not endemic to Buffalo, nor are they any reason to abandon ship for more prosperous climes. Given the proper strategy and tools, Buffalo may yet experience resurging vitality and livelihood. Both strategy and tools exist, and they are the focus of this paper. Buffalo is updating its zoning code to promote smart, sustainable growth through its "Buffalo Green Code" project, as part of its comprehensive strategy for urban revitalization and

¹ David Robinson, *Jobless Rate in Region Dropped in February*, BUFFALO NEWS.COM, Mar. 30, 2011, <http://www.buffalonews.com/business/article379937.ece>. This figure was down from 9.5% in February of the previous year but is nevertheless high. Id.

² Jay Rey et al., *Area Population Decline Continued in 2000s, Census Data Shows*, BUFFALO NEWS.COM, Mar. 28, 2011, <http://www.buffalonews.com/city/census/article375470.ece>.

³ Mark Sommer, *EPA Cites Coke Plant for Cyanide Violations*, BUFFALO NEWS.COM, Aug. 27, 2010, <http://www.buffalonews.com/city/article173624.ece>.

⁴ Id.

⁵ Francesca Levy, *Best and Worst Cities for Commuters*, FORBES.COM, Feb. 16, 2010, http://www.forbes.com/2010/02/12/best-worst-commutes-lifestyle-mass-transit_chart.html.

redevelopment.⁶ This paper will examine the context in which that redevelopment takes place before consideration of available tools the city might employ to give force and effect to its goals. It will analyze those tools with respect to Buffalo's comprehensive redevelopment plan, suggest some potential zoning ordinances to employ, and evaluate the mechanics of implementing a new zoning code as a whole. Throughout the paper, I will argue that rezoning the city of Buffalo must be executed at all times in light of the methods by which it will serve the needs of all residents, particularly those of low-income and minority communities.

Sustainability in Context

Sustainable growth, and by extension sustainable zoning, are only as effective as the policy and ideology undergirding it. An ideological framework that understands cities to be ecological systems is of foremost importance.⁷ A given city exhibits behavior characteristic of an ecological metabolism – resources are both generated and consumed by components within the system, creating useful and necessary products fueling the city itself, while at the same time creating waste products harmful to that system.⁸ Cities, residents of which form but one element, not only “devour” resources produced within the system at exponentially higher rates as the population increases, they also generate correspondingly higher levels of waste material.⁹

The rate of production of harmful elements is often a function of the manner in which the city evolves as an ecological system.¹⁰ As cities grow without due regard to the impact of that growth, they evolve into sprawling behemoths that require more resources to sustain and create more waste than their more compact counterparts.¹¹ Residents must commute to jobs typically

⁶ The Buffalo Green Code website is the project's central hub, and may be accessed at <http://www.buffalogreencode.com/>.

⁷ RICHARD ROGERS, *CITIES FOR A SMALL PLANET* 30 (Philip Gumuchdjian ed. 1997).

⁸ Id.

⁹ Id. at 31-33.

¹⁰ Id. at 33.

¹¹ Id.

located in downtown business areas or suburban business parks and shop in outlying commercial districts to meet their domestic needs, for example.¹² Inefficiently planned cities therefore encourage unhealthy and inefficient dependence upon cars and the thoroughfares to conduct them from point to distant point, subjecting residents to higher levels of pollution as well as the social cost of hours spent in transit.¹³

Sprawl itself is a multi-headed hydra. The vastness of space occupied by large, low density cities does not simply punish residents by confining them to their automobiles. It subjects them to pollution generated by impervious surfaces; paved roads, sidewalks, and even driveways contribute extensively to water pollution as storm water runoff carries with it the toxic veneer of chemicals left behind by passing humans.¹⁴ Large homes often characteristic of sprawling metropolitan areas also consume substantial amounts of energy and water, releasing more carbon dioxide into the air in exchange.¹⁵

If a city is an ecological system consuming extraordinary amounts of resources when organized inefficiently, the key is clearly to structure that system to operate as efficiently as possible. Ecological systems must therefore be developed and maintained according to the tenets of sustainable development, which is an approach to development that attempts to meet the needs of the present without compromising the ability of future generations to meet their own needs.¹⁶ Sustainable development requires cities to be compact, densely populated and organized around centers of social and commercial activity located at public transport nodes.¹⁷ The urban landscape should be walkable, well-served by transit, feature abundant biophilia, as well as

¹² Id.

¹³ Id. at 33-36.

¹⁴ Sarah Gardner, *The Impact of Sprawl on the Environment and Human Health*, in *URBAN SPRAWL: A COMPREHENSIVE REFERENCE GUIDE* 241, 251 (David C. Soule ed., 2006).

¹⁵ Id. at 242-47.

¹⁶ DANIEL K. SLONE ET AL., *A LEGAL GUIDE TO URBAN AND SUSTAINABLE DEVELOPMENT* 29 (2008).

¹⁷ ROGERS, *supra* note 7, at 38.

diverse - urban areas should include mixed use development calculated to permit residents to meet their daily needs without reliance on automobiles.¹⁸

The critical unit within sustainable urban development therefore becomes the neighborhood.¹⁹ Properly organized and defined, the neighborhood becomes the center of an urban resident's life, providing all the necessary amenities and attractions in an appealing, unique fashion that makes people *prefer* not to commute to a remote suburban commercial subdivision to do their shopping, socialize, and even work.²⁰ That organization is achieved in part by clustering homes along grids, rather than isolated cul-de-sacs and broader roads with high rates of speed.²¹ Parking lots and garages are relocated from the property's frontage, the area facing the main thoroughfare on which it is situated, to the rear of the property - or even underground, where circumstances permit.²² The aforementioned centers of social and commercial activity should be brought forward on the property, toward the sidewalk, in line with other buildings along its public transport node, and they should be appealing in character.²³ Similar policy applies in residential areas; they should be nearby local social and commercial centers, and the lots must be smaller than those found in suburban developments, varied in size and price so as to foster diverse neighborhoods feeding social and commercial interaction.²⁴ Orienting development in such a manner ensures not only more efficient resource consumption, but also a sense of community; by "rejecting the dominance of the car" and providing urban residents with close-knit, complete

¹⁸ DOUGLAS FARR, SUSTAINABLE URBANISM: URBAN DESIGN WITH NATURE 41-45 (2008).

¹⁹ Id. at 43-45.

²⁰ Id. at 45.

²¹ SLONE ET AL., *supra* note 16, at 10.

²² Id. Circumstances would likely permit such parking in downtown commercial business districts.

²³ Id.

²⁴ Id.

communities rather than sprawling shopping centers, citizens consume fewer resources, are subjected to reduced amounts of pollution, and generally enjoy a higher quality of life.²⁵

Tools of the Trade: Methods of Promoting Sustainability

Sustainability is an amorphous concept, the invocation of which, without more, does little to improve the lives of urban residents. It requires policies, codified in law, to give it force and effect. A proactive tax policy is one method. For example, tax incentives that make it economically viable for developers to incorporate green roofs in their developments, as a method to reduce stormwater runoff laden with pollutants, limit the amount of impervious surfaces contributing to pollution in urban areas.²⁶ Building codes, laws, and programs encouraging certain energy efficient practices and materials are another method. Participation in the Energy Star Building program, purchasing or producing green energy, laws that direct developers to reduce greenhouse gas emissions, and comprehensive “Green Building Codes” that require new construction and substantial renovations to comply with green building standards are several other effective methods of implementing the concept of sustainability.²⁷

Sustainability may also be achieved by zoning laws that regulate land use. Zoning laws are restrictive planning tools that divide municipal areas into districts for the purposes of specifying particular uses to which that land may be used.²⁸ The goal of zoning regulations in part is to ensure that incompatible uses do not exist within the same district or zone;²⁹ separating heavy industrial areas from residential neighborhoods ensures that citizens do not wake up one morning

²⁵ ROGERS, *supra* note 7, at 38; FARR, *supra* note 18, at 45.

²⁶ THE LAW OF GREEN BUILDINGS: REGULATORY AND LEGAL ISSUES IN DESIGN, CONSTRUCTION, OPERATIONS, AND FINANCING 258-60 (J. Cullen Howe & Michael B. Gerrard eds., 2010). A green roof is typically a flat roof, rather than a roof on an angle, that is partially or completely covered with vegetation and soil, and may include drainage and irrigation. Its purpose is the management and reuse of stormwater to reduce the amount of pollutant leeching from impervious surfaces that occurs after rainfall. *Id.*

²⁷ HOWE & GERRARD, *supra* note 26, at 55-58, 71-78, 135.

²⁸ STEPHANIE B. KELLY, COMMUNITY PLANNING: HOW TO SOLVE URBAN AND ENVIRONMENTAL PROBLEMS 63 (2004).

²⁹ *Id.*

to find a steel plant in their backyards. It is important to note, therefore, that zoning laws do not tell developers *how* to build; rather, they define what may be built within a particular zone, and may articulate guidelines or requirements regarding the appearance of permitted uses. In other words, zoning ordinances set the table for future development in a manner that is respectful of environmental, social, and economic concerns.

Zoning ordinances themselves begin with a map delineating the zoning districts and an accompanying text setting forth the regulations to be applied to their respective districts.³⁰ In its most simple form, zoning districts divide land into residential, commercial and industrial zones and set forth the permissible uses to which those zones may be put, the dimensions of lots, and the location of buildings on those lots, known as “setbacks.”³¹ More complex zoning laws regulate the characteristics of land use, such as intensity and rate of speed of vehicles on roadways within the zone; the required street frontage, width and depth of a structure on an individual lot; the percentage of the lot that may (or must) be covered by buildings; the location and number of parking spaces that must be present on a plot of land, the maximum and minimum height of structures on the lot, as well as whether they may be used for multiple uses, known as mixed use, that would incorporate both commercial and residential uses on an individual lot.³²

Zoning ordinances cannot be deployed arbitrarily; instead, they often must be enacted pursuant to a master, or comprehensive, plan.³³ Master plans are the product of the municipality’s government, and set forth specific goals for the region to be achieved by implementation of the guiding framework enunciated within the plan.³⁴ That framework

³⁰ *Id.* at 69.

³¹ *Id.* at 69-71.

³² *Id.* at 70.

³³ See, e.g., *Gernatt Asphalt Prod., Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 684-85 (1996). JAMES M. MCEL FISH, JR., NATURE-FRIENDLY ORDINANCES 31 (2004). In New York, zoning ordinances are indeed required to be enacted pursuant to a “well considered plan.” N.Y. GEN. CITY LAW § 20(25) (McKinney 2001).

³⁴ MCEL FISH, *supra* note 33, at 31-32.

typically identifies key regional sites that stand to benefit from preservation, economic redevelopment, infill (meaning development occurring within an urban area for the purposes, in part, of achieving greater density and even economic and social rebirth within that area), and then articulates the metropolitan area's policy for directing development within that framework.³⁵ A city's master plan, therefore, is often specific and detailed with respect to critical areas within the region and the goals to be achieved, while its guiding framework is less restrictive and defined in order to permit flexibility.³⁶

Zoning laws therefore give force and effect to a municipality's master plan. However, the ability of a comprehensive zoning ordinance to control use and character of land is also the ability to control the lives of residents within those districts, an occasionally invidious practice against which urban planners must remain vigilant. Consider that zoning laws have been regarded as a "root enabling cause of disproportionate burdens [and] environmental justice."³⁷ Zoning has historically, and continues to be, employed not simply to divide land uses, but to situate noxious, undesirable manufacturing and industrial zones adjacent to residential districts populated by low-income and racial minorities.³⁸ A disproportionate burden therefore falls upon communities that can obviously least afford to bear that burden, manifested in abnormally high rates of cancers and other diseases.³⁹ Impermissible zoning motives may even extend to the preservation of property values within districts, not only through relocation of uses that would leave blemishes on otherwise pristine residential districts.⁴⁰ By prohibiting the presence of

³⁵ Id.

³⁶ Id.

³⁷ Juliana Maantay, *Zoning Law, Health, and Environmental Justice: What's the Connection?*, 30 J.L. MED. & ETHICS 572, 572 (2002).

³⁸ Id. at 572-74.

³⁹ Id.

⁴⁰ Id. at 576.

mobile homes, apartment complexes, and affordable housing in general, zoning has been employed to, “in effect, legislat[e] the income level of the community’s residents.”⁴¹

Municipalities must take great care to ensure that abhorrent practices such as these are not included, even unintentionally, within any zoning ordinances under consideration. Fortunately, safeguards exist. Community participation is effective and should be part of the development of any zoning ordinance, yet some scholars have noted that it is often equivocal; “process equity,” meaning that potentially affected groups have been granted due process and their concerns have been considered, does not necessarily lead to “outcome equity.”⁴² Overburdened groups may continued to be burdened, even where the process is fair, when there are no provisions for ensuring that the *effect* of zoning upon all parties is equitable.⁴³

“Public health components” are often more effective, yet sorely underused.⁴⁴ A well-crafted public health component inserted into a zoning ordinance would require governments to consider the impact and outcome on environmental justice communities that typically bear a disproportionate burden of the effects of zoning.⁴⁵ It should include provisions that bind governments to compile and analyze data on public health concerns, such as the impact on disadvantaged communities and how best to promote exercise and healthful living, to consult with public health agencies in the development of their zoning ordinances, to create interdisciplinary coalitions to develop the best health outcome for each community, and to educate citizens on the importance of zoning laws and their health.⁴⁶ These steps would

⁴¹ Id. at 577.

⁴² Id. at 586.

⁴³ Id.

⁴⁴ Vanessa Russell-Evans & Carl S. Hacker, *Expanding Waistlines and Expanding Cities: Urban Sprawl and Its Impact on Obesity, How the Adoption of Smart Growth Statutes Can Build Healthier and More Active Communities*, 29 VA. ENVTL. L.J. 63, 102 (2011).

⁴⁵ Id.

⁴⁶ Id. at 102-03.

drastically improve the ability of zoning laws to address important public health and environmental justice concerns within the municipality's rezoned districts.

Opening the Zoning Toolbox: Zoning Ordinance Categories

Several categories of zoning ordinances exist for the purpose of executing a master plan. Incentive zoning, for example, is a versatile tool that dangles a carrot on a stick in front of developers. An applicable incentive zoning ordinance might offer a density bonus, permitting a developer to reduce the required density on a particular lot, or it might create a bonus permitting construction of a larger project than would otherwise be authorized, in exchange for the inclusion of other highly desirable features, such as increased green space/biophilia incorporated into the site plan, transit infrastructure, or even the addition of affordable housing units into the project.⁴⁷ Properly employed, incentive zoning ordinances allow developers to retain control of the design and construction of buildings located on their lots, subject to building codes and other laws, while simultaneously fostering consideration of amenities for the public good adjacent to those structures.

Performance zoning is a similarly effective zoning tool, setting benchmarks for developers to meet. These benchmarks take the form of performance standards, rather than identifying specific areas to be restricted to certain uses, conditions, and so on, and therefore provides developers discretion in their ability to dictate the form and substance of development projects, so long as the performance standards are met.⁴⁸ A typical performance zoning ordinance, for example, might set a standard for natural resource protection, or it might set a limit for impervious surfaces within an individual development.⁴⁹ Performance ordinances are also desirable for their

⁴⁷ MCELISH, *supra* note 33, at 55-56.

⁴⁸ *Id.* at 58.

⁴⁹ *Id.*

flexibility, as they may be deployed within standard zoning districts, augmenting the environmental impact of the zoning code for that district.⁵⁰

Traditional Neighborhood Development (“TND”) is often the heart of a zoning code, especially within an established city that seeks to mimic compact development prevalent before World War II.⁵¹ TND ordinances are aptly suited for fostering compact urban areas by emphasizing mixed use structures featuring both commercial and residential tenants within a development.⁵² Additionally, a TND district will often exhibit at least some minimization of impervious surfaces and street width, and will encourage larger sidewalks, green spaces and impose maximum setback limitations to ensure that on-site parking occurs behind the building rather than in front of it.⁵³ Enhancing the sustainability of a TND district might further be encouraged by imposing design features within individual lots or portions of the district, such as bioswales – pockets or areas of biological life (trees, other plants, and green space in general) conducive to proper drainage, reducing toxic runoff from impervious surfaces – or open common areas teeming with attractive plant life.⁵⁴

TND districts are clearly flexible and useful; established districts that need minimal foundational work (such as ordinances directed at new growth, like street width in districts that need not consider adding new streets) might consider TND development as a method of preserving existing character within that district. A city’s cultural center, for example, might benefit from TND development geared toward preventing implementation of a new site plan on a vacant lot from leading to a large, unwelcome and out of place parking lot with little to no plant life from taking root in that district. Ordinances designed to foster mixed use, biodiversity, and

⁵⁰ Id. at 59.

⁵¹ Id. at 61.

⁵² Id.

⁵³ Id.

⁵⁴ Id.

sustainable infrastructure within that TND district might be judiciously employed as incentive and performance standards designed to meet the needs of particular areas within each individual urban pocket of the municipality.

Form based codes provide another flexible zoning tool. Their purpose is less to regulate the use of the land than to regulate the “relationship between building facades and the public realm;” in other words, they emphasize the ultimate physical form of the development as a method of preserving a neighborhood’s particular character, or creating a distinct feel where haphazard development previously reigned.⁵⁵ Form based codes are place specific, meaning that they are keyed, or written, to meet the needs of a given community.⁵⁶ For example, a city’s cultural district might consider application of a form based code imposing a “look alike” requirement on future development within that district to maintain the area’s distinct feel and appearance.⁵⁷ However, planners must choose their implementation of form based codes carefully, as they need not be imposed as mandatory codes.⁵⁸ Instead, they may be enacted as a parallel set of regulations that overlay a standard zoning ordinance, as in a TND district, to provide additional standards and regulations.⁵⁹

Applying the Lessons: Examples

Having outlined the applicable principles of sustainability and articulated the relevant tools to implement those principles, it would certainly be instructive to review a few examples. River Falls, Wisconsin, enacted a TND Ordinance in 2002 that is simple, straight forward, and applicable to existing development.⁶⁰ Section 17.112.020 of the ordinance incorporates a

⁵⁵ SLOANE ET AL., *supra* note 16, at 111-12.

⁵⁶ *Id.* at 112.

⁵⁷ *Id.* at 125.

⁵⁸ *Id.* at 126.

⁵⁹ *Id.*

⁶⁰ COMPENDIUM OF LAND USE LAWS FOR SUSTAINABLE DEVELOPMENT 364 (John R. Nolon, ed., 2006).

statement of intent, listing its purpose as the “development of fully integrated, mixed use pedestrian oriented neighborhoods” that “minimize traffic congestion, suburban sprawl, infrastructure cost, and environmental degradation,”⁶¹ thereby codifying the most critical aspects of sustainability into its guiding framework. To that end, TND districts are required to “mix land uses,” utilizing one of three categories: residential uses, a mixed-use area, and open space.⁶² Residential uses are further divided in § 17.112.050 and require a mix of small lots, single and multi-family dwellings, and “special needs housing,” defined to include assisted living facilities.⁶³ The ordinance ensures a balanced mix of housing that will guarantee traditional residential neighborhoods that minimize exclusion by requiring multi-family dwellings. However, this section omits, and would benefit from, a requirement that a portion of the residential units be affordable housing structures, a measure that would substantially address environmental justice concerns.

The mixed-use portion of the ordinance establishes standards for incorporating commercial, residential, civic, and open space uses within the neighborhood. It requires the residential buildings to be within either one-half mile or a fifteen minute walk from commercial, civic, and open space areas, thereby minimizing the travel required for citizens to meet their daily needs.⁶⁴ The ordinance further provides that the commercial areas offer a range of services to the neighborhood’s residents, ensuring that citizens have ready access to food services, retail business, and various other desirable amenities.⁶⁵ Additionally, 90 percent of residential lots

⁶¹ Id.

⁶² Id. at 365.

⁶³ Id.

⁶⁴ Id.

⁶⁵ Id.

must be within one-half mile or a fifteen minute walk from open green space for the enjoyment of residents.⁶⁶

However, lot standards within this ordinance’s mixed use districts are not terribly flexible. Section 17.112.050 includes no incentive or performance standards for use of biophilia within any portion of the lot. Further, while that section appropriately states that commercial and civic buildings on lots within the TND “should abut the sidewalks in mixed-use area,”⁶⁷ it ought to employ mandatory language in terms of a maximum setback. Imposing a maximum setback of twelve feet, for example, permits developers the room necessary to incorporate biological features, common areas (such as patios) within developments to facilitate public socialization, and so on. While a “look alike” standard might be too restrictive to use broadly, such an ordinance could be used where this TND might be employed in neighborhoods of unique character. An ordinance to preserve a neighborhood’s character would be a Form Based Code and therefore could either be injected directly into this TND plan or enacted separately as a parallel ordinance, as mentioned *supra*.

The River Falls TND additionally addresses other key features of established urban neighborhoods. It facilitates multiple modes of transportation by requiring provisions for adequate pedestrian and bicycle routes that “minimize pedestrian-motor vehicle conflicts.” The ordinance further includes standards for sidewalks that are at least 5 feet wide, and construction of public transportation amenities where appropriate.⁶⁸ Including the standard that the pedestrian routes minimize conflict is a nice touch; merely providing them does not automatically imply safety. That provision should be, but is not, extended to the bicycle routes. Traffic in general

⁶⁶ Id.

⁶⁷ Id. at 366.

⁶⁸ Id. at 367.

must exhibit “traffic calming features” that “encourage slow traffic speeds,” though no maximum speed limits are imposed.⁶⁹

Where parking for transportation within the district is involved, the TND ordinance insists that parking lots not only be “located at the rear or side of a building,” but that they also be screened in accordance with applicable landscaping and screening standards.⁷⁰ The importance of such a provision would be difficult to overstate. Relegating the location of the parking areas to the rear or side of a lot assures patrons of mixed use areas that they will not have to traipse across unattractive, glass strewn asphalt slick with automotive oil. Rather, the structures on each lot will be largely in line with one another, maintaining a close-knit community and sense of place. Unfortunately, the section’s treatment of parking and other impervious surfaces only states that “reduction of impervious surfaces . . . is strongly encouraged for areas such as remote parking lots”⁷¹ There should be an economic carrot dangled in front of developers here, in the form of an incentive or performance standard for impervious surfaces. Proper treatment of stormwater runoff by the reduction of impervious surface area, through bioswales and/or green roofs should earn developers a bonus – perhaps a reduction in the amount of the lot area they are required to develop, for example.

The River Falls case is a study in simplicity. Its TND ordinance is short and to the point, and appropriate for a city of just over 14,000 residents.⁷² Further, it is one of perhaps several different ordinances used throughout River Falls; a TND being desirable in an established community, it would not serve new development as well as other zoning tools. However, the River Falls TND ordinance is merely illustrative, for our purposes. It demonstrates how zoning

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Id.

⁷² RIVER FALLS, WI – THE CITY ON THE KINNI (May 19, 2011), <http://rfcity.org/>.

tools and approaches are implemented, and contains several elements that would likely be employed in a larger urban setting. Yet given the disparity in size between Buffalo and River Falls, it is clear that a simple TND ordinance would not adequately address the variety of districts present within Buffalo. Buffalo requires more diversity and complexity within its code to reflect and address those elements mirrored within its city limits. Complexity is therefore compounded as the size of the municipality increases. For those reasons, many cities have turned to the SmartCode, a customizable and comprehensive zoning ordinance developed by the urban planning firm Duany Plater-Zyberk.

The SmartCode demonstrates the type of zoning ordinance likely to be developed for the city of Buffalo. It attempts to apply a single ordinance to a municipality to address current and future development through the use of transect zones rather than zoning according to “separated-use.”⁷³ Transect zones are zoning districts organized along a scale according to the various common elements that make up human habitat within that zone.⁷⁴ The SmartCode employs seven such transect zones: T1 zones embody all features common to natural habitats, T2 corresponds to rural developments, T3 zones describe suburban developments, T4 represents general neighborhoods while T5 zones regulate neighborhood commercial centers for mixed use purposes, and both T6 and SD (special district) zones are designed for use in urban core areas.⁷⁵ Each transect is regulated by its own zoning ordinances as well as ordinances applicable throughout the code for the purposes of achieving sustainable growth and development.⁷⁶ Those regulations pertain to the form of the building and block, as well as where particular types of each are placed within a

⁷³ SLONE, ET AL., *supra* note 16, at 15, 129. See also Center for Applied Transect Studies, the SmartCode iv (2009), <http://www.transect.org/codes.html> [hereinafter *the SmartCode*].

⁷⁴ Id. at 15.

⁷⁵ Id.

⁷⁶ Id. at 129.

community.⁷⁷ It also promotes compact mixed use in particular transects where such development should be encouraged, if not required, and incorporates incentives such as fast-tracked administrative reviews, fee waivers, and subsidies distributed in exchange for code compliance.⁷⁸

Mechanically speaking, the SmartCode integrates sustainability largely on a transect by transect basis. Its statement of intent reads much like that of the River Falls, Wisconsin TND ordinance, but adds provisions that the less complex code omitted, such as the commitment to providing affordable housing throughout the region to match job opportunities and to avoid concentrations of poverty.⁷⁹ Further, the SmartCode incorporates various types of zoning frameworks, such as TND districts for established neighborhoods and cluster development ordinances for new developments for assignment to appropriate transects.⁸⁰ Infill TND transects provided by the SmartCode are particularly desirable in established urban areas struggling to rebuild after periods of economic decline, and are coded accordingly.⁸¹ As they address a number of issues that municipalities plagued by urban blight and environmental issues must face, they are assigned to the T3-6 transects.⁸² Infill TND transects utilize mixed use zoning regulations for neighborhood areas that feature suitable mixed use corridors, but it also provides for special zoning of important commercial areas, such as downtown commercial centers, through its Infill RCD (Regional Center Development) zoning ordinances.⁸³

TNDs within the SmartCode's urban zones encourage mixed use and compact development through form based regulations; thus, the SmartCode relies heavily on dimensional regulation.

⁷⁷ Id.

⁷⁸ Id. at 129-31.

⁷⁹ Article 1.3.1, The SmartCode, *supra* note 62, at 3.

⁸⁰ Id. at 16.

⁸¹ Id.

⁸² Id. at ix.

⁸³ Id. at 17. The SmartCode's customizability permits these requirements to be changed from optional to mandatory in the municipality's discretion. Id.

For example, the SmartCode adequately fosters compact urban development through its density regulations and the imposition of maximum, rather than minimum, setbacks that decrease to 12 feet from the sidewalk as the transects move toward urban core zones.⁸⁴ These provisions, coupled with infill ordinances that require mixed use development, ensure that buildings are not pushed back from major arterial streets within their zones. Instead, they are clustered along the front of the lot, greatly enhancing the street's appearance. Yet the SmartCode (in its basic format) does not provide any tradeoffs with respect to these regulations in exchange for including bioswales for reduce stormwater runoff into the sewer system, choosing instead to require trees to be planted within urban zones.⁸⁵

Where parking is concerned, lots may not feature sprawling parking areas, because the lot occupation standards require the structure(s) on the lots to occupy 70% of the total space at a minimum, reaching 90% for urban centers.⁸⁶ Furthermore, the SmartCode imposes parking regulations upon lots by standardizing the formula by which a lot's available parking spaces are calculated, decreasing to a rate of 1.0 parking spaces for urban residential lots and 2.0 assigned parking places per 1000 square feet of net office space.⁸⁷ Parking areas are also required to be located at the rear of the lot.⁸⁸ Regulating parking areas in this manner concretizes the minimization of impervious surfaces in a way that the River Falls, Wisconsin ordinance is incapable of doing.

As these examples illustrate, the SmartCode heavily incorporates form based regulations to achieve density, character, sustainability, and a sense of compact community. The code is also comprehensive; desirable features omitted from the base portion might be added individually by

⁸⁴ Id. at 42, 45.

⁸⁵ Id. at 24-25.

⁸⁶ Id.

⁸⁷ Id. at 39.

⁸⁸ Id. at 44.

the municipality, or through available modules. Municipalities considering adoption of the SmartCode would likely consider ordinances that not only require, but incentivize developers to comply with the regulations, as well as potentially adding ordinances designed to preserve the character of key neighborhoods and cultural centers within the city, encourage affordable housing, and address other issues specific to the city in question.

Buffalo's Green Code: Suggestions Designed to Implement Buffalo's Comprehensive Plan

Buffalo's Comprehensive Plan informs and guides the development of a new zoning code.⁸⁹ The Comprehensive Plan does not simply enumerate policies to consider during the zoning code revision process. It articulates Buffalo's vision for city-wide economic redevelopment, preservation of its historical heritage and environmental resources, as well as its goals for promoting equality, diversity, and sustainability. Therefore, any and all selections of appropriate zoning strategies whether they are customizable plans like the SmartCode, stand alone tools like incentive zoning, or an intelligent matrix of both, must take these goals into account. Given Buffalo's projected path, its unique features, and the fact that it desperately requires infill (since it is the most vacant city in New York State),⁹⁰ I propose that the city approach its Green Code through the customization of the Neighborhood Conservation Code ("NCC"), a variant of the SmartCode specifically designed for use by established urban municipalities that have little need for the portions of the SmartCode pertaining to new development, suburban development and so on.⁹¹ However, the NCC must be calibrated to the unique characteristics of the city of Buffalo,

⁸⁹ The Comprehensive Plan, adopted in 2006, is available through the Document Library at the Buffalo Green Code website, <http://www.buffalogreencode.com/document-library/> [hereinafter *Comprehensive Plan*].

⁹⁰ Phil Fairbanks, *City Keeps its Status as State's Emptiest*, BUFFALO NEWS.COM, Apr. 5, 2011, <http://www.buffalonews.com/city/article384614.ece>.

⁹¹ The nonprofit Center for Applied Transect Studies distributes the Neighborhood Conservation Code as well as the Smart Code, and it may be accessed at <http://www.transect.org/codes.html> [hereinafter *Neighborhood Conservation Code*].

both through available modules and the addition of incentive, performance, and other zoning tools.

The NCC functions as a pared down version of the SmartCode designed to combat precisely what ails Buffalo. As a preliminary measure, it will require the addition of a public health component incorporating all of the elements discussed *supra* into the planning process, for the purposes of addressing environmental justice. I would additionally include a citizen-suit provision designed to provide environmental justice review on an “outcome equity” basis to ensure that residents within the city are capable of challenging zoning ordinances that subsequently prove to be inequitable.

Turning to zoning districts imposed by the NCC, residential areas within the city will become Infill TND zones. Little will change for most neighborhoods; the Seneca Street region referenced earlier already conforms to most of the NCC’s requirements, and we must note that the NCC uses form based codes, discussed earlier in the context of the SmartCode, rather than density requirements to encourage compact neighborhoods.⁹² However, the Comprehensive Plan notes persistent racial inequality in Buffalo, manifested in part by community segregation.⁹³ In light of those inequalities and the opportunity to develop abundant vacancies throughout the city, Infill TND zones require affordable housing provisions. Requiring approximately 20% of new residential construction to be affordable housing would likely go a long way to permitting low income populations to live in neighborhoods of their choice, rather than historically underserved pockets of the city.⁹⁴ These new developments would further be required to conform to the lot orientation specified within the code, thereby ensuring proper character and privacy within

⁹² *Neighborhood Conservation Code*, *supra* note 80, at 2.

⁹³ *Comprehensive Plan*, *supra* note 78, at 19-20.

⁹⁴ The inclusion of a provision requiring affordable housing does find support within the Comprehensive Plan. *See Comprehensive Plan*, *supra* note 78, at 23-25.

residential areas. It might be prudent to include performance or incentive standards that entice developers to consider low income populations' needs, such as transportation amenities within those multifamily residential structures by offering benefits such as the ability to construct smaller, shorter buildings on the lots, or tax incentives (which would be outside the purview of the zoning ordinance to implement). The code should also be structured to require green space and abundant plant life lining roads within Infill TND zones to alleviate the often gray and dilapidated appearance of Buffalo city streets.

Recall also that the NCC, as a variation on the SmartCode theme, imposes requirements upon Infill RCD (Regional Center Development) zones that feature accompanying regulations regarding form and lot orientation, parking requirements, minimization of impervious surfaces, and so on. I propose zoning major arterial roadways in Buffalo (those that are key to a neighborhood's commercial and social livelihood) accordingly. Streets such as Seneca Street in South Buffalo, the "Elmwood Strip" area of Elmwood Avenue, the "Hertel Strip" portion of Hertel Avenue, and similar neighborhoods would be zoned as Infill RCD districts. Zoning these areas in such a manner is less oriented toward changing their character than preserving and amplifying it, as these are centers of commercial and social activity. Moreover, these districts, particularly the Elmwood and Hertel strips, have unique character found nowhere else within the city. Thus, they would benefit substantially from "look alike" provisions, or similar ordinances written so as to require preservation of the community's character.

Incentive and performance standards could augment the look and feel of these areas as well. Provisions that encourage the use of bioswales, alternative energy sources, bicycling infrastructure, and implementation of green roofs (a building code issue unless city planners were to concede other requirements within the zoning ordinance in exchange for their

construction) would greatly improve the environmental health of heavily traveled commercial areas. Since Infill RCD zones require mixed use development, they would also likely exclude low income populations without the requirement that they feature some percentage of affordable housing as part of those developments. Affordable housing in areas like Elmwood Avenue makes additional sense given that the area is largely populated by a mix of college students, low income families, along with other groups.

Buffalo's Comprehensive Plan also notes the existence of brownfields throughout the city; 49 of 56 brownfields moreover are located within Strategic Investment Corridors.⁹⁵ To the extent that Buffalo wishes to develop these brownfields into mixed use developments, they should progress according to TND type development to mirror the compact nature of established neighborhoods. I suggest avoiding conversion of brownfields into commercial parks despite the fact that many of them are 5 acres or larger.⁹⁶ Such a plan would ignore the availability of real estate in downtown Buffalo.⁹⁷ More importantly, however, the potential availability of brownfield sites could be used to develop civic green space or opportunities for alternative energy, such as wind farms, or even both. The NCC is more suited to development of wind farms than green space, given the availability of appropriate modules, but it isn't incapable of preserving public greens for residents to enjoy either.⁹⁸

The downtown area is perhaps the most important piece of Buffalo's revitalization puzzle. The Comprehensive Plan acknowledges that fact, noting that the downtown area has unique features such as its waterfront and distinct architecture, readily available commercial structures,

⁹⁵ *Comprehensive Plan*, *supra* note 78, at 76.

⁹⁶ *Id.*

⁹⁷ *Id.* at 14.

⁹⁸ See the list of available modules in the NCC, *Neighborhood Conservation Code*, *supra* note 80, at 4.

and the opportunity to expand its residential capabilities.⁹⁹ Here the NCC is once again capable of properly zoning the area with its RCD regulations and an available module for Canal Urbanism.¹⁰⁰ The downtown Waterfront region will likely need to be zoned as an urban core district, T6, but it will also probably require an overlay zoning ordinance designed to add additional provisions to promote green space, mixed use, and various modes of transportation.

The key goal throughout the downtown region will be preservation of character. Buffalo's downtown commercial district is home to several unique architectural attractions, such as the Louis Sullivan Guaranty Building.¹⁰¹ A vibrant downtown should respect the past without compromising modern design; I would therefore eschew a "look alike" provision in favor of incentives (as the city sees fit) for developers to consider construction that fits the area in which the building will be located. Lastly, but equally important, Buffalo's downtown ought to be more green – literally. Provisions must be present within the downtown zoning ordinances requiring developers to include abundant biophilia within their projects to minimize the impact of stormwater runoff in exchange for zoning bonuses or tax incentives.

Conclusion: Opportunities and Challenges

The discussion above relates to a few of the more pressing concerns within the Buffalo area that the Green Code may help address. It is not meant to be an exhaustive list; indeed it cannot be. Instead, it serves to highlight the challenges of implementing a zoning code that addresses current weakness by providing solutions in the future. The sheer abundance of available choices, including writing a new code from scratch, is in fact one of the largest challenges. But an appropriate guiding framework possesses the ability to change the city's landscape for the better, providing nearby, accessible amenities to all residents within the city. Buffalo's Green Code is

⁹⁹ *Comprehensive Plan*, *supra* note 78, at 82-83.

¹⁰⁰ *Neighborhood Conservation Code*, *supra* note 80, at 4.

¹⁰¹ *Comprehensive Plan*, *supra* note 78, at 15.

therefore not only the first step, but perhaps the most important one in realizing the city's Comprehensive Plan.