

Regulatory Created Blight in a Legacy City: What is it and What can we do About it?

Including a Historical Review of Planning and Zoning in Memphis

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Abstract: *Memphis, Tennessee, located in Shelby County, has an extensive legacy in land use regulation, having been the first city in Tennessee and one of the first in the South to engage in comprehensive planning and zoning. While arguably progressive at the time adopted, there has been a general failure of the regulations to keep pace with market realities. Today, a series of complex and sometimes contradictory land use regulations, often with a storied history in the Tennessee courts, have the effect of holding back progress in the modern urban built environment. Memphis has gone through no less than four comprehensive zoning ordinances, each with very different regulations guiding growth and development. Layer in decades of changing construction standards and building regulations, mostly written and enforced without regard for practical neighborhood realities, and you begin to understand regulatory created challenges in the current urban context. Older developments and uses built or established under prior regulations are often seen as damaging to changing neighborhoods. Newer land use regulations enacted to address poor site design and inappropriate close proximity between incompatible uses may have the unintended consequence of maintaining the status quo and discouraging redevelopment and reinvestment. Newer building regulations designed with modern perspectives on safety and technology yield large swaths of buildings undevelopable, and when rigidly enforced trap many an older building in the past. Regulations imposed by a city to protect the city may also do a great deal to hold the city back. A careful review of the impact of land use and building regulations reveals that the very tools designed to stimulate*

growth and positive development often instead create abandonment and decline.

Disclosure

The authors wish to clarify from the beginning that we are not land use, community development, or building code scholars. We all count “lawyer” among our titles, but we find that most of our days as practitioners are filled with urban planning and development, community revitalization, real estate, code enforcement, policy, and other related decisions. As we discussed the drafting of this article, we worked on but failed to settle upon a joke that opens “a planning director, a community developer, and a litigator walked into a bar . . .” We are serious about the work that we do to bring about the revitalization of declining Memphis neighborhoods, but want the reader to understand that this piece is not a scholarly piece but more like “notes from the field” and a description of the challenges and opportunities that we have observed in our years of observing, and engaging in, efforts to bring about improvement in some of Memphis’ most distressed communities.

I. INTRODUCTION

Historically, few cities and their suburbs have placed a high enough priority on planning or growth management, preferring instead, intentionally or not, the proliferation of unplanned new development around the edges. In Memphis, Tennessee, this has certainly been the case for decades. The Memphis story includes decades of infrastructure investments in far outlying areas that were annexed as older neighborhoods received little or no infrastructure maintenance or improvements. Illustrative of this challenge is the fact that between 1970 and 2010 the population of the City of Memphis increased by 4% while the geographic area of the city increased by 55%.

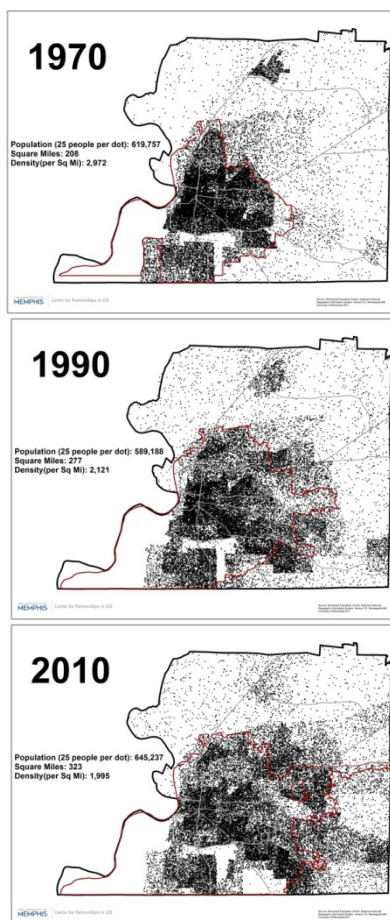


Image 1: Population Distribution. Population distribution of the residents of Memphis and Shelby County between 1970 and 2010. Each dot represents twenty-five people. The red line represents the geographic boundary of the city of Memphis at each the respective year.

The decades-long combination of policies encouraging low-cost greenfield development, public investments in new infrastructure at the edge of the city, and an expanding urban level of services provided by county government triggered aggressive annexation by the city. This massive shift in population from the city's historic neighborhoods to the new suburban options masked a shrinking city population helped maintain short-term financial solvency. This trend continued largely unquestioned by policy makers from the 1960's until the great recession of 2008.

Since the recession there has been a renewed interest in strengthening historic neighborhoods and infill development. 2010 marked the first year that the population inside the 1970 city of Memphis boundaries has increased since the 1960s. Today, there are more than \$4 billion in development projects inside the 1970 city boundaries. Many of these projects represent large-scale investments targeting urban areas in downtown Memphis and in areas along Memphis' primary commercial corridors, Poplar Avenue and Union Avenue.

Meanwhile, in a time of renewed interest in development and revitalization of the core, many neighborhoods in and near the core—often just blocks away from the referenced corridors—remain literally in shambles. For example, a recent visual survey of a one-thousand parcel neighborhood adjacent to Memphis' thriving medical center reveals that one in three parcels is a vacant and abandoned lot. Owner occupants of a nearby small cluster of historic homes are attempting to hold on, but their home values have declined to such an extent that they are trapped. Investment, even by community minded, socially progressive organizations is stymied. Neighborhood commercial development is non-existent, and the majority of single family and multi-family residential rental properties are in poor condition. What factors influenced the decline of this once thriving neighborhood? And how can the vacancy and abandonment be addressed?

There are no simple answers. Most conversations about the challenge of vacancy, abandonment, and redevelopment of real estate in American cities involve the thorny question of the "root causes" of vacancy and abandonment, or "blight." Blight, as used in this Article, is a term commonly used across the United States to describe real property that is in a state of deterioration beyond what is acceptable to the surrounding community. We are aware of, and sensitive to, the concerns that have been raised about the use of the term historically, but the phrase is used here for lack of a simpler descriptive phrase. Where practical, the phrase "blighted property" is used instead.¹

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***Image 3:** This 10 to 12 unit “shoebox” apartment building, typical of many found throughout Memphis, often on formerly single family lots, has been abandoned because there is no current market for it in its neighborhood.*

II. BLIGHT IN MEMPHIS: THE EXTENT OF THE CHALLENGE

While there are many positive things happening in Memphis, it is important to understand the nature and extent of the vacancy and abandonment Memphis is experiencing. Memphis is by far the largest city in Shelby County, Tennessee, comprising more than 70% of the tax parcels and 41% of the land area, or 315 square miles. In Shelby County there are 351,000 parcels of land. The two best indicators of the presence and scale of blight in Memphis are parcels that are delinquent on property tax payment and numbers of structures with no utility connections for an extended period of time.

In Memphis, at least 34,000 parcels are delinquent on the payment of real estate taxes, a commonly used indicator of abandonment, and 53,000 parcels are vacant lots. As of 2010, more than 10,000 single family homes and more than 3,000 units of multifamily housing in Memphis had been without utilities for more than a year. In three of the seven City of Memphis Council Districts (Districts 4, 6, and 7), the percent of residential properties without utility services as of 2013 (including single-family and

multifamily units) exceeded 10% (approximately 12,000 units).² A report based upon a survey of all residential parcels in Memphis completed in 2010 found that Memphis “blight rate” was 22%.³

A comprehensive parcel survey of Memphis is currently nearing completion,⁴ and Memphis leaders are nearing a complete “blight data” warehouse, which will be called the Memphis Property Hub. This snapshot of the extent of blight in Memphis should make it clear that the challenge is daunting and that urgent responses are required.

III. DIFFERENT TYPES OF BLIGHT

Regulatory Created Blight (or “Regulatory Blight”) has different causes than non-regulatory blight and calls for a different range of responses than other types of blighted properties. Regulatory blight occurs in three major instances: hardship, walk-away, and economic. Each of these is prevalent in Memphis and is described below.

A. Non-Regulatory Blight

1. Hardship Cases

Sometimes genuine economic hardship is the only reason for the physical deterioration and lack of maintenance of a property. Owners in these cases have not abandoned their real estate—they simply do not have the means to maintain it. These owners may reside in a deteriorating house that they cannot afford to repair, or they may own a dilapidated residential rental property or storefront that was, or was planned to be, a source of additional income before some hardship made it impossible for them to make repairs necessary to keep the property in acceptable condition. For example, an 85-year-old owner of a single-family home in a well-

2. This was calculated using the City of Memphis Neighborhood Blight Abatement Strategy (a PowerPoint document). The source of the data was Memphis Light Water and Gas spreadsheets, which we evaluated by district.

3. See TK BUCHANAN ET AL., NEIGHBORHOOD-BY-NEIGHBOR: A CITYWIDE PROBLEM PROPERTY AUDIT (Apr. 2010), https://web.archive.org/web/20121202112712/http://cbana.memphis.edu/GenResearch/NxN_SUMMARY_FINAL_REVISION_8_30_2010.pdf.

4. The “Bluff City Snapshot” is expected to be complete by mid-2016.

preserved neighborhood experienced a house fire several years ago in which he lost everything. The house became uninhabitable, but he did not have insurance. He maintains the rose beds and visits the front porch on a regular basis, but has no way to complete repairs and move back in.⁵ These are perhaps the most sympathetic cases.

2. Walk-away Cases

Other owners of blighted property have the means to maintain their real estate but have abandoned it because they have determined that any further investment in maintaining or improving it will not provide any return. These owners have usually stopped paying property taxes and mortgages, and are either attempting to “walk away” from the property or are speculating that someday there will be a demand for the real estate sufficient to cover years of deferred maintenance and other expenses and provide the owners with a return on their investment. One example of an owner of this type of blighted property is the investor who buys total loss burned out houses for cash at an extreme discount, and takes no action to maintain them but holds out hope that he will find other investors who will join in his ill-fated venture to repair and sell the houses at a profit.



5. City of Memphis v. LT Boyce, Shelby County Environmental Court, Case No. 12637035.

Image 4: *This vacant, bank-owned house drew the ire and activism of neighbors.*

Sometimes these owners acquired the blighted property as a part of a bulk acquisition, knowing that a certain percentage of the properties would have no value; other times these owners made money in the past from their real estate but due to market changes, neighborhood changes and/or lack of adequate maintenance and upkeep, profitability is no longer feasible under their business model. Another category of such owners are the well-documented foreclosing lenders who have taken back real property through the foreclosure process only to find, once the title is in the name of the lender, that there is no market for the property.⁶

Resolution to this type of case is often made more complex by the imposition of tax penalties, administrative fees, penalties, and the like that become attached to the real property and further hinder its disposition or redevelopment. In this way, these cases move into the regulatory blight category, as discussed below.

3. Economic Cases

Still other owners of blighted property, particularly in thriving or upward trending communities, have the means to maintain their real estate and know that their real estate has market value and demand, but for reasons, either rational or irrational, have determined to neither improve nor sell their real estate. In some of these cases, an owner is holding out for a higher sale or rental price or a better or longer-term tenant. In other cases, no logical reason can be ascertained as to why an owner will not sell or lease a marketable property in a high demand area.

Sometimes owners have formed an irrational emotional attachment to a property and believe against all reason that they will someday develop the property themselves or sell for an outrageous profit. One example of an owner of this type of blighted property is the dreamer who acquired a vacant mid-rise commercial building with an attractive historical façade on the edge of a thriving commercial district. For twenty-five years he planned to develop it

6. For an insightful analysis of many components of this type of blight, see Kermit J. Lind, *Collateral Matters: Housing Code Compliance in the Mortgage Crisis*, 32 N. ILL. U. L. REV. 445 (2012).

himself, and therefore turned down countless reasonable offers based on appraised value. Meanwhile, he invested only the bare minimum that was required by enforcement agencies, and the large vacant structure loomed over a would-be thriving block, attracting crime and promoting decay for blocks.

B. Regulatory Created Blight

Distinguishable from hardship, walk-away, and economic cases are situations where the primary driver of blight is regulatory in nature. We are unaware of an extensive scholarly analysis of this less understood cause of blighted property, which we refer to as “regulatory blight.”⁷



***Image 5:** This large vacant downtown midrise is surrounded by development, but the owner’s expectations of financial return and lack of experience in development of this nature has resulted in at least fifteen years of complete inactivity.*

The owners or prospective purchasers of these blighted properties have the means to maintain, repair, or develop their real estate, and it would be marketable if they did so. The logjam for these properties, and the reason they remain blighted, is the applicable local regulations and/or the local approach to the enforcement of those regulations.

7. The three authors of this Article are practitioners in planning (Whitehead), community revitalization (Pacello), and anti-blight litigation (Barlow). We readily acknowledge our “non-scholar” status, and are hopeful that this effort to compile our practitioner perspectives may stimulate more discussion of this crucial issue at the scholarly and practitioner level.



***Image 6:** This superfund site has been cleaned at various levels over decades since a cooperage business went out of business at the downtown Memphis site. Taxes owed and the fear of future environmental threats have prevented any development of the site, despite a resurgence of development around the perimeter.*

The economic costs to the would-be developer of bringing these blighted properties back in conformance with zoning and subdivision regulations, building codes, fire codes, property maintenance codes, and/or other locally enforced, usually locally enacted, regulations is, or is perceived to be, greater than the economic benefits to the developer. In other words, owners or potential purchasers are priced out of redeveloping the blighted property due to the presence of regulatory restrictions so costly to follow that the project has no economic feasibility.

One example of regulatory blight can be observed in the form of longtime vacant upstairs flats over commercial space in a resurgent downtown district with high residential rental demand, where the cost and complexity of complying with regulations for occupancy of such second story flats makes doing so practically impossible.

In an environment where local government is the first defense against the damage done by blighted properties, this is a type of blighted property which local government is perhaps in the best position to address by improving the regulatory environment

through amending local ordinances and regulations and making improvements to regulatory enforcement mechanisms.

It is our belief that the lack of contextually applicable local regulations and/or their enforcement without regard to the real estate realities at the neighborhood level has the direct result of creating and maintaining blight in urban areas where development is most needed. Ironically, this is particularly the case in older neighborhoods where local government is striving to revitalize the very neighborhoods that its own regulations are holding back.

IV. REGULATORY BARRIERS

The two areas of regulation that most directly limit, and often prevent revitalization of core city neighborhoods, particularly when it comes to small-scale development, are the zoning and subdivision regulations and the building codes.⁸ The zoning and subdivision regulations control what any owner or user is permitted to do on their property, including how big the building(s) may be, how much land must be associated with the building type, what improvements are required, and other operational controls on the land. The building codes, on the other hand, have more to do with minimum construction standards, materials, safety concerns as well as fire and health restrictions.

The chart below outlines the regulatory categories through examples of what is regulated by each code section. Together these codes create a complex array of regulations thousands of pages long that constantly evolve. The complexity inherently favors larger projects by experienced developers who know how to navigate the system or are able to hire experts to do it for them.

8. An important difference between the zoning and subdivision regulations and the building codes is that the states grant local governments the authority to adopt zoning and subdivision regulations as they see fit but mandate local government to adopt certain model building codes with very limited flexibility. Therefore, while there is broad local control in the enforcement of building codes, local government must work with state government where those building codes imposed do not meet the local government needs.

	Common Regulations Found in Zoning, Subdivision and Building Codes				
Zoning Codes	Allowed use of property	Height of building	Setback from lot lines	Required parking and location	Lighting and landscaping standards
Subdivision Codes	Size of lot	Size of blocks	Access and connectivity	Utility connections	
Building Codes	Building material requirements	Building access and ADA compliance	Fire Prevention requirements	Energy efficiency requirements	Heating, Cooling, and Plumbing standards

*A. Memphis and Shelby County Land Use Codes:
A Historical Overview*

Zoning and subdivision regulations, together referred to as “land use controls,” as applied and enforced, directly impact the feasibility of revitalization of blighted properties and abandoned neighborhoods. A full review of the history of land use controls in Memphis provides invaluable context for any conversation about how to streamline regulations to promote positive growth and lends an important perspective to any urban revitalization thinking and planning. This lengthy historical overview is intended to set the context and provide a common starting point for discussion about how these and other regulations may be improved to facilitate the removal of unnecessary regulatory barriers to otherwise desirable blight elimination efforts.

As noted above, Memphis was the first city in the State of Tennessee to engage in planning and zoning. On March 30, 1920, the City Commission, precursor to today’s City Council, passed an ordinance creating a citizen City Planning Commission. A year later, on February 3, 1921, the Tennessee General Assembly passed legislation specifically for Memphis (through what is known as a “private act”), granting the Planning Commission formal powers such as the authority to recommend adoption of a zoning code and to hear appeals and variance requests from the admin-

istration of the code.⁹ Tennessee's first zoning ordinance, including its first zoning map, was adopted by the City Commission on November 17, 1922.

While Memphis' 1921 private act authorizing the creation of the Memphis Planning Commission was silent on a general plan, the general acts that affect all other cities in the state are not.¹⁰ With that said, Tennessee is generally considered to be a state that takes a unitary approach to planning as it relates to zoning, meaning that the zoning map may act as the general plan in the absence of such a plan.¹¹ Despite the absence of any public acts recommending or mandating the adoption of a comprehensive plan, or the fact that the private act for Memphis was silent on the issue, the City Planning Commission entered into a contract with Harland Bartholomew of St. Louis for the purpose of preparing a long range city plan for the growth and development of the city. This plan, entitled "A Comprehensive City Plan," was presented to the Planning Commission for their approval in 1924.

In an effort to separate the long range planning and zoning activities from individual hearings of variances and appeals, the General Assembly passed a private act for Memphis on April 3, 1925, to create the Memphis Board of Adjustment ("The Board").¹² The Board was created as a zoning board that would act independently of the Planning Commission, and to some degree, the Comprehensive City Plan that it had promulgated a year before. The Board met for the first time on July 16, 1925. One unique aspect with the Board's enabling legislation was that the General Assembly included the term "use of land" on the list of zoning regulations that Board could waive. This has enabled Memphis' zoning board to approve *use* variances, which distinguishes it from the general act that enables all cities throughout the state to create zoning boards.¹³

9. 1921 Tenn. Priv. Acts, ch. 165, 450–55; Memorandum from Josh Whitehead, Sec'y, on History of Board of Adjustment to Bd. of Adjustment 3 (Dec. 17, 2014), <http://www.shelbycountyttn.gov/DocumentCenter/View/19403>.

10. See TENN. CODE ANN. §13-4-201 (2011).

11. Edward J. Sullivan & Matthew J. Michel, *Ramapo Plus Thirty: The Changing Role of the Plan in Land Use Regulation*, 35 URB. LAW 75, 98 (2003).

12. 1925 Tenn. Priv. Acts, ch. 428, Sec. 1, 1622.

13. See TENN. CODE ANN. § 13-7-207(3) (2011).

Due to the rapid growth of the City of Memphis in the 1920s, the City petitioned the State to pass enabling legislation granting it some level of land use authority over properties just outside of its borders. This culminated with the passage of a private act by the General Assembly on June 25, 1931, which not only granted the City Board of Commissioners zoning authority over zoning decisions in the five-mile area outside of the corporate limits of the City of Memphis, but it also created a Shelby County Planning Commission and Board of Adjustment to review and amend a zoning code and hear variance requests, respectively.¹⁴ Like the earlier private act, this legislation was silent on long range planning and granted the Board of Adjustment use variance powers.

As development was also occurring in the area more than five miles away from the city limits, Shelby County petitioned the State for the ability to plan and zone for these unincorporated areas. The State obliged with the passage of two pieces of legislation. The first was passed by the General Assembly on April 18, 1935, that authorized the County Planning Commission to review and approve a zoning code and amendments thereto in the area outside of the five-mile zone. This private act also created a County Board of Adjustment that was supposed to be separate and apart from the five-mile Board to hear variances.¹⁵ Like the two enabling acts creating the City and County Boards of Adjustment, this new Board was authorized the power to grant use variances. The second piece of legislation was approved by the General Assembly on April 20, 1935. It represented a first in Memphis and Shelby County: it authorized the Shelby County Planning Commission to adopt a general plan for the development of the area under its purview.¹⁶

14. 1931 Tenn. Priv. Acts, ch. 613, 1649, 1649–66; Memorandum from Josh Whitehead, Sec’y, on History of Board of Adjustment to Bd. of Adjustment 4 (Dec. 17, 2014), <http://www.shelbycountyttn.gov/DocumentCenter/View/19403>.

15. 1935 Tenn. Priv. Acts, ch. 625, 1650, 1650–62; Memorandum from Josh Whitehead, Sec’y, on History of Board of Adjustment to Bd. of Adjustment 4 (Dec. 17, 2014), <http://www.shelbycountyttn.gov/DocumentCenter/View/19403>.

16. 1935 Tenn. Priv. Acts, ch. 706, 1869, 1869–79; Memorandum from Josh Whitehead, Sec’y, on History of Board of Adjustment to Bd. of Adjustment

For the next twenty years, a small planning staff supported the City and County Planning Commissions and the City and County Boards of Adjustment (a third Board of Adjustment was never created, despite the explicit instructions by the General Assembly to do so, which would become problematic in the future). In December of 1955, the final draft of a comprehensive plan was submitted to the Board of Commissioners of the City of Memphis and the City Planning Commission. Entitled *The Comprehensive Plan*, it outlined growth and development of the city for the next twenty-five years. Like the 1924 long-range plan, it was authored by Harland Bartholomew and Associates of St. Louis. By the 1950s, there was a growing concern that the somewhat archaic and cumbersome arrangement of having two planning boards and two zoning boards was not conducive to the post-war boom that Memphis and Shelby County were experiencing.¹⁷ *The Comprehensive Plan* called for the merger of the City and County Planning Commissions and Boards of Adjustment. This prompted the General Assembly to pass enabling legislation to the same effect on March 17, 1955.¹⁸

On May 31, 1955, the Board of Commissioners of the City of Memphis passed a new zoning code. This marked the first major revision to the City's zoning ordinance since it was adopted in 1922. In early 1956, in response to *The Comprehensive Plan* and General Assembly action of the previous year, the City and County approved an ordinance merging the Planning Commissions and creating a more formal and professional Planning Commission staff to administer the new zoning code. The Boards of Adjustment were not merged at the time, but the Planning Commission staff continued to serve these two zoning boards.

4 (Dec. 17, 2014), <http://www.shelbycountyttn.gov/DocumentCenter/View/19403>.

17. HARLAND BARTHOLOMEW ET AL., *THE COMPREHENSIVE PLAN* 104–05 (1955).

18. 1955 Tenn. Priv. Acts, ch. 353, 1180, 1180–85; Memorandum from Josh Whitehead, Sec'y, on History of Board of Adjustment to Bd. of Adjustment 4 (Dec. 17, 2014), <http://www.shelbycountyttn.gov/DocumentCenter/View/19403>.

1. History of the Board of Adjustment

One final significant zoning event occurred in 1955: the amendment of the Memphis Board of Adjustment's enabling legislation. On February 28, 1955, the General Assembly added language that required the Board make certain findings as to the exceptional nature of a piece of property as a predicate to it approving a variance on that property.¹⁹

In 1962, plans for a Texaco station at the corner of Poplar venue and June Road in East Memphis were filed with the Board of Adjustment.²⁰ As the property was zoned residential, the request represented a use variance. The Planning Commission was adamantly opposed to this request; its staff drafted a policy statement urging that the entire 17-mile stretch of Poplar from Highland to Collierville remain exclusively residential. In addition, a neighboring property owner, James N. Reddoch, urged that the Board reject the case. The Board held the case in abeyance for seven months as it considered the request. Finally, on April 11, 1963, the Board heard the request. Despite opposition from neighboring property owners and a recommendation of rejection from its staff, the Board approved the service station on the basis that a hardship did in fact exist as the owner had attempted to sell it for many years as a residential property but to no avail. Mr. Reddoch appealed. This appeal eventually found its way to the Tennessee Supreme Court, which found in favor of the Board of Adjustment. In *Reddoch v Smith*,²¹ the Court reviewed the private acts governing the Board and agreed it had the authority to approve use variances and that no peculiar feature of the property was necessary as a predicate of its findings. However, it also included analysis of the trial judge on the case, Shelby County Circuit Court Judge Edward Quick, who found that there should have been three Boards of Adjustment in Memphis and Shelby County (not two), but that the Shelby County Board had been acting as the *de facto* board for both the five-mile zone and the outside-five-mile zone.

19. 1955 Tenn. Priv. Acts, ch. 142, 418, 418–20.

20. Memphis and Shelby County Board of Adjustment Archives, Case No. BOA 62-35 (County).

21. 214 Tenn. 213 (Tenn. 1964).



Image 7: Gasoline station at Poplar and June that was the subject of the Reddoch case. Memorial Park Cemetery and Memphis Hilton are seen in the background.

Eight years later in 1969, an application was submitted to the Board of Adjustment to allow 165 apartment units on Helene, north of I-240 and south of Quince, in a single-family zoning district. The Board approved this use variance request. The neighbors appealed and the case made its way up to the Tennessee Supreme Court. In *Glankler v. City of Memphis*,²² the Court agreed with the Board that the cost of removing the property out of the 100-year floodplain represented a hardship that warranted the request. It also cited its *Reddoch* case from eight years prior as precedence on the ability of the Board to grant use variances, even though the board in the *Reddoch* case was the County Board and the board in the instant case was the City Board, which had its enabling legislation amended by the General Assembly in 1955.

22. 481 S.W.2d 376 (Tenn. 1972).



Image 8: Apartments proposed on Helene that were the subject of the Glankler case.

In early 1969, the Memphis City Council and Shelby County Quarterly Court (precursor to today's Shelby County Board of Commissioners) approved a joint ordinance/resolution that split the staffing duties of the Boards of Adjustment away from the Planning Commission, possibly the result of the growing rift that had developed between the Board of Adjustment and Planning Commission over the former's use variance authority. Despite the City Council and Quarterly Court's frequent disagreement over the Board's use variances on particular properties, this joint ordinance/resolution reflects some measure of approval of the zoning "relief valve" that the use variance process embodied.

The newly independent Boards of Adjustment soon found themselves in controversy. Later in 1969, plans were submitted to the County Board for a mobile home park at the southwest corner of Shelby Drive and Crumpler. The County Board approved the request over the objections of neighboring property owners, who subsequently sued the Board in Shelby County Circuit Court. In his order overturning the Board, Judge Greenfield Polk cited the "renowned" *Reddoch v. Smith* decision, particularly the section of the case where the Supreme Court recites verbatim Judge Quick's analysis of the private acts that govern zoning in Memphis and Shelby County.²³ Judge Polk found that the Shelby County Board of Adjustment's authority in the five-mile zone effectively ended on May 8, 1964, the date the Tennessee Supreme Court decided

23. Bell v. Shelby Cty. Bd. of Adjustment, No. 20071RD (Cir. Ct. Shelby Cty., Div. 5 Apr. 29, 1970); Memorandum from Josh Whitehead, Sec'y, on History of Board of Adjustment to Bd. of Adjustment 4 (Dec. 17, 2014), <http://www.shelbycountyttn.gov/DocumentCenter/View/19403>.

Reddoch and put the Board on notice it was not properly empaneled under the “de facto doctrine.” Judge Polk’s order was handed down on April 29, 1970, which set off a series of events that eventually resulted in the merger of the Memphis and Shelby County Boards of Adjustment.

After the Boards of Adjustment merged into one, plans were submitted by Shell Oil to build a service station at the northeast corner of Summer and Graham.²⁴ The Board approved the request for a commercial use in a multi-family zoning district.²⁵ The Court of Appeals affirmed the ability of the *joint* Board to grant use variances in *Houston v. Board of Adjustment*, even though the court found that no hardship in this case existed and overturned the Board’s approval of the service station.²⁶ The court was persuaded by evidence presented to the Board that the existing apartments had enjoyed a high rate of occupancy.²⁷



Image 9: Extant apartment building at the corner of Summer and Graham, site of *Houston* case.

24. *Houston v. Bd. of Adjustment*, 488 S.W.2d 387, 387–88 (Tenn. Ct. App. 1972).

25. *Id.* at 389.

26. *Id.*

27. *Id.*

2. Office of Planning and Development

By the early 1970s, nearly the entire staff of the Planning and Development Office was devoted to subdivision and zoning cases. This led to criticism by some members of the community that the City and County were not engaging in long-range planning to the degree of many of its peer cities. This culminated in a report published in May of 1975 by the American Society of Planning Officials (the "ASPO," one of the predecessors of today's American Planning Association). In their report, the ASPO bristled at the state of planning affairs in Memphis and Shelby County. They recommended a complete overhaul of the organization that would require, by ordinance, that it engage in long-range planning efforts. The ASPO report also recommended that many zoning decisions be made at the Planning Commission level with only appeals heard by the legislative bodies. This, they found, would make zoning less political. Finally, the ASPO recommended that the General Assembly amend the private acts affecting the Board of Adjustment so it would no longer be able to approve use variances after a zoning case had failed before the City Council or Quarterly Court.²⁸

The ASPO report sent shockwaves through 125 and 160 North Main Street (the City Hall and County Administration Buildings, respectively). For the past few years, the Planning Commission had difficulty hiring a Planning Director as there were questions over the ethics and educational background by the Memphis City Council and Shelby County Quarterly Court of its choice. Under the 1955 ordinance, the Planning Director first had to be chosen by the Planning Commission, then their choice had to be approved first by the Mayor of Memphis, the Chairman of the Shelby County Commission and then the respective legislative bodies of the City and County.

In 1976, the City and County took the advice of the ASPO and overhauled the Planning Commission organization with the adoption of Joint Ordinance/Resolution 2524. First, Ordinance/Resolution 2542 renamed the citizen body from the Planning

28. AM. SOC'Y OF PLANNING OFFICIALS, MAKING JOINT PLANNING WORK: AN ADMINISTRATIVE STUDY OF THE MEMPHIS AND SHELBY COUNTY PLANNING COMMISSION ch. 1 (1975).

Commission to the Land Use Control Board. Second, it reorganized the Planning Commission staff as the Office of Planning and Development (“OPD”), which was to contain two separate sections: (1) Land Use Controls, which would staff the Land Use Control Board and (2) Comprehensive Planning, which would create a citywide and/or countywide plan and various neighborhood plans. The former would be funded largely through application fees to the Land Use Control Board; the latter would be funded largely by the Community Development Block Grant (“CDGB”) program of the federal government. No action was taken on the Board of Adjustment or its still-autonomous staff, which indicates that the City and County still appreciated, to some degree, the relief valve provided by that quasi-judicial body.

About a year later, in 1978, the City of Memphis created the Division of Housing and Community Development (“HCD”) to perform certain long-range planning functions. This new branch of government would eventually receive directly all federal CDBG funds, leaving none for OPD and its planning efforts, therefore greatly impacting OPD’s ability to draft long-range plans and to meet the comprehensive planning requirement of Ordinance/Resolution 2524. Nevertheless, OPD completed a new comprehensive, citywide and countywide plan, titled “Memphis 2000” in 1981. As was customary with previous comprehensive plans, Memphis 2000 was accompanied by a new zoning ordinance, the third since the original zoning ordinance in 1922.

In addition to the elimination of access to federal funds for comprehensive planning efforts that came with the creation of HCD, two Court of Appeals decisions in the early 1980s greatly impacted long-range planning in Memphis and Shelby County. The first, *Barret v. Shelby County*, involved a rezoning on Austin Peay Highway near the Tipton County line.²⁹ OPD recommended against the rezoning based on a comprehensive plan that allegedly covered the area in question and a general policy on rezoning that had been the past practice of the Shelby County Quarterly Court. In the *Barret* decision, the Court of Appeals states they are “unmoved” by terms such as “spot zoning” and “approved compre-

29. *Barret v. Shelby Cty.*, 619 S.W. 2d 390, 391–92 (Tenn. Ct. App. 1981).

hensive plan”³⁰ and further stated that a local legislative body “is not bound by any comprehensive plan. *If it were, there would be no need for rezonings.*”³¹

A few years following the *Barret* case, the Court of Appeals took a different look at comprehensive planning when it held that an apartment building on the north side of Park Avenue east of Estate Drive was arbitrary and capricious because it was out of line with the approved neighborhood plan.³² The *Barret* and *Ray* cases may be differentiated by the fact that the *Barret* case involved a rezoning and a very loose comprehensive plan and the *Ray* case involved a planned development and a very specific comprehensive plan. Nevertheless, the two cases resulted in a general reluctance for either the City or County to spend time or resources on comprehensive plans.



Image 10: Apartment building that was the subject of the *Ray* case.

B. The Unified Development Code

By the dawn of the twenty-first century, there was a general feeling from a variety of fronts that the 1981 zoning ordinance no longer met the needs of the community. Developers found it cumbersome to such a degree that almost all projects were processed as planned developments, which had the ability to waive any regula-

30. *Id.* at 392.

31. *Id.* at 394 (emphasis added).

32. *Ray v. Dattel*, 1985 WL 1126692, at *11 (Tenn. Ct. App. Aug. 2, 1985).

tion found in the zoning ordinance. Many community groups felt that it promoted automobile-oriented development at the expense of inner-city neighborhoods. So, beginning in 2003, work began for the creation of a revised zoning ordinance, which was in keeping with the long history of creating a zoning code about once every thirty years (1922, 1955, and 1981). Dubbed the Unified Development Code, or (“UDC”) or (“Code”), for *unifying* the zoning ordinance with the subdivision regulations, the Code took several years to complete. During that time, there was an intense conversation over the level of aggressiveness that should be embraced by the new set of regulations. For some, the UDC represented an opportunity to end the practice of planned developments and variances and to generally raise the bar for new development by adopting a form-based code. For others, this approach seemed radical and politically impracticable.

An outside consulting firm was hired to assist with the creation of the UDC. Its work was augmented by a separate initiative by OPD, Sustainable Shelby. The first several drafts of the UDC reflected the aggressive approach to planning and zoning pursued by many design professionals. In time, the contract with the outside consulting firm expired and in-house discussions began, many of which with practitioners who had worked with the 1981 and even the 1955 zoning codes. There were personnel changes both within and outside of the OPD that eventually helped craft a Code that was ready for approval in 2010. One of the authors of this Article, Josh Whitehead, ushered the new Code through its approval by the Memphis City Council and Shelby County Board of Commissioners in the summer of 2010. By that fall, he was appointed Planning Director of the City and County and administrator of the Code.

The UDC became effective on January 1, 2011. Shortly after adoption, the staff at OPD noticed that many routine zoning requests required action by the Memphis City Council, contrary to the premise made during the adoption of the UDC that the Code would streamline and provide efficiencies in the zoning entitlement process. Indeed, it had become apparent to OPD and an increasing number of elected officials that the team tasked with writing the UDC had inadvertently, or perhaps deliberately, altered the use chart in such a way that thousands, if not tens of thousands, of properties had converted from legal, “by right” uses to noncon-

forming uses with the adoption of the Code. And unlike downzonings, this was done without individualized notice.³³

Many property and business owners found that the uses on their properties and inside their buildings had been made nonconforming by the adoption of the UDC. This left them captive to various zoning entitlement processes that they were not subject to before the UDC was adopted. But in addition to these individuals, there were also thousands upon thousands of additional owners of nonconforming *sites*. The UDC had created a regime where almost every property required zoning fixes from the regulations dealing with items such as maximum building setbacks, parking lot islands, landscaping buffers, location of sidewalks, etc. This not only strayed from the objective of the UDC to promote development, but was also a departure from a long standing zoning tradition in Memphis and Shelby County whereby “by right” uses are incentivized by allowing administrative site plan review.

Although the UDC has been amended several times since its initial manifestation to reduce the situations cited above, the exercise of amending the Code does highlight the unfortunate reality of regulatory blight. Even in its present form, the UDC and its associated entitlement processes may be too onerous for many properties in neighborhoods with few economic opportunities and with low land valuation.

1. Suburban Sprawl

One of the primary goals of the UDC was to curtail, at least to whatever degree practicable, suburban sprawl. Metropolitan Memphis is one of the most sprawling cities in America, as measured by job creation in relation to the urban core.³⁴ Unfortunately, the City of Memphis never used its extraterritorial jurisdiction to

33. A down-zoning is a government-initiated rezoning of one or more privately held parcels from a zoning district that permits more intensive uses to a zoning district that permits less intensive uses. Since there is a finite geography affected, notice for down-zonings involves a mailed notice to all owners of properties that are subject to the rezoning.

34. See ELIZABETH KNEEBONE, METRO, POLICY PROGRAM, JOB SPRAWL STALLS: THE GREAT RECESSION AND METROPOLITAN EMPLOYMENT LOCATION 7 (2013), http://www.brookings.edu/~media/research/files/reports/2013/04/18-job-sprawl-kneebone/srvy_jobsprawl.pdf.

limit sprawl in the 5-mile zone outside of the city limits. Instead, it pursued an aggressive annexation policy whereby it would extend its sanitary sewers into the 5-mile area, approve zoning and subdivision requests in the area and then annex the area when it achieved a certain level of population attainment.

While no zoning code has the real or apparent authority to turn back the clock on decades of an annexation system that promoted sprawl, the UDC did attempt to combat sprawl in ways the 1981 Zoning Code did not. For instance, the 1981 Code contained strict Euclidian zoning districts that neither promoted nor allowed mixing uses with one another. Front yard setbacks were excessive; floor area ratio was common with office buildings and maximum dwellings per acre dominated the multi-family section. The UDC turns all of these regulations on their head, by either eliminating the requirements altogether or stipulating the polar opposite. For instance, mixed use buildings with ground floor retail on the bottom floor and apartments above are incentivized by being permitted “by right” in commercial zoning districts while conventional apartments require action by the governing body. As for annexation, in 2014, the General Assembly changed the state’s annexation laws by requiring the approval of a majority of the property owners affected by the annexation. This will likely end the long-standing sewer extension policies of the City.

2. Form-Based Code

In addition to attempting to discourage sprawl, the UDC also moved into a regulatory system in which many design issues were given greater emphasis. This would ideally foster vibrant urban spaces that could better compete with their suburban counterparts. Chief among the new design-related regulations is the requirement, along certain roads throughout the city, to build new buildings in close proximity to their adjacent sidewalks in order to create a more pedestrian-friendly and urban streetscape. In this respect, the UDC has elements of a form-based code. The existing regulation was problematic in that it did not include provisions for existing buildings. In fact, many of the streets designated by the UDC and its overlay districts had been developed as suburban corridors in the first few decades after World War II. Buildings along these streets were mostly located behind wide swaths of parking lots and green spaces, and they all immediately became noncon-

forming structures with the adoption of the UDC and its overlay districts. Prohibiting any expansion to existing buildings that did not involve the construction of a sidewalk-backed storefront created a measure of turmoil in the local development sector. Many business owners decided not to improve their properties, or worse, to vacate them and relocate to other sections of the metro area rather than file for variances with the Board of Adjustment. The few property and business owners that decided to submit variance applications faced an uphill battle as many UDC stakeholders took the opportunity to attack the applicants for their unwillingness to adhere to the UDC. The Office of Planning and Development staff, due to their recommendations made on these cases, also suffered some degree of political pressure from those who assisted in the drafting of the UDC and its overlay districts. Further discussion on form-based codes may be found in Part V below.



***Image 11:** Example of the form-based nature of the Unified Development Code is demonstrated with this new Subway restaurant at Madison and Manassas.*

3. Nonconformities

In a perfect world, a community could adopt or amend its general plan and zoning ordinance and enjoy the results of its regulatory regime instantly as would be the case with a game of

“SimCity.” However, most states either prohibit or largely restrict a municipality’s ability to retroactively zone properties. This leaves the built environment in a sort of hodgepodge where older developments built under relatively loose zoning regulations stand side-by-side to newer developments built under stricter zoning regulations. “Grandfathered” sites and uses are protected from adhering to the provisions of a new or revised zoning ordinance and are therefore known as “nonconformities.” Whether nonconformities contribute to blight or help create an interesting and vibrant neighborhood is a matter of debate.

Nonconformities differ greatly from state to state and municipality to municipality. In Tennessee, the 1935 public act enabling municipalities to engage in zoning has been periodically amended by the General Assembly to expand the rights of nonconformities. For instance, under Tennessee Code Annotated section 13-7-208, nonconforming uses may be discontinued for a period of 30 months without losing their grandfathered status.³⁵ Each year, the General Assembly considers bills that would greatly expand this permissible cessation period, with the most excessive being 20 years.³⁶ In addition, the public acts permit nonconformities to not only expand and build additional facilities,³⁷ but also to be torn down completely and rebuilt if there’s a demonstrable “business necessity.”³⁸ The Court of Appeals of Tennessee has found that the latter enabled nonconforming billboards of various sizes in Johnson City to be enlarged to the now standard size of 672 square feet because such an upgrade was found to be a “business necessity.”³⁹

Despite the generous provisions of the Tennessee public acts that address nonconformities, one of its provisions, Tennessee Code Annotated section 13-7-208(j) limits some of its applicability. For instance, the 30-month cessation rule does not apply to home-rule cities, of which there are thirteen in Tennessee. The zoning ordinances in these communities rule the length of discon-

35. See TENN. CODE ANN. § 13-7-208(g) (2011 & Supp. 2015).

36. See S.B. 1467, 106th Gen. Assemb., (Tenn. 2009).

37. See § 13-7-208(c).

38. See § 13-7-208(d)(1).

39. *Outdoor W. of Tenn. v. Johnson City*, 39 S.W.3d 131, 137–38 (Tenn. Ct. App. 2000).

tinuance. Some home rule cities limit their cessation period to six months; Memphis, which is also a home rule city, limits its period to one year. In addition to the provisions of Tennessee Code Annotated section 13-7-208(j), section 13-7-210 allows cities with zoning ordinances promulgated by private acts to be exempt from many provisions of the zoning public acts, including those involving nonconformities. For instance, when a very similar case had been filed against the City of Memphis and Shelby County that had been filed against Johnson City to allow many “junior billboards” to be upsized, the court found for the City and County based on Tennessee Code Annotated section 13-7-210.⁴⁰

On one hand, the ability of a community to address blight through its zoning code is severely limited by its ordinances and enabling laws that govern nonconformities. For if a city cannot adequately address noxious nonconforming uses, it may find it difficult to attract investment in the area around that nonconforming use. On the other hand, blight often is not exhibited in the form of nonconforming uses and businesses but rather the absence of uses and businesses. By aggressively targeting nonconformities, a city could dampen reinvestment into a particular section of town where the only viable reinvestment that might occur, at least for a foreseeable period, comes from these very nonconforming businesses. While the community may have down-zoned the nonconformities in an effort to eradicate them, it may later find that its zoning ordinance was too idealistic and should be implemented on a more gradual, piecemeal approach. There are others that claim that a resurgent community built around nonconformities is what differentiates an older urban neighborhood from its banal counterparts in the suburbs. In Memphis, such examples are the Sugar Services facility at G.E. Patterson and Tennessee and the Turner Dairy on Madison in Overton Square.

40. *Prime Locations, Inc. v. Shelby Cty.*, No. CT-006449-04, 2010 WL 8705666 (Tenn. Cir. Ct. May 26, 2010).



Image 12: Aerial photograph of Sugar Services at GE Patterson and Tennessee in downtown Memphis (center right) in the midst of residential development.



Image 13: Aerial photograph of Tuner Dairy in Midtown Memphis in the midst of commercial redevelopment of Overton Square.

As outlined above, with the UDC's adoption, thousands, if not tens of thousands, of nonconforming uses were created at midnight on December 31, 2010, the date the UDC took effect. Uses that were once permitted in their zoning district were no longer permitted. Undefined uses were now defined and explicitly prohibited. While this would not have presented a large problem in most of Tennessee's cities where nonconformities are permitted some degree of expansion, discontinuance and continued exist-

ence, the same was not true in Memphis and Shelby County, which operate under the more restrictive private acts. Ironically, the first few drafts of the UDC attempted to omit the planned development tool, despite the fact that the voters had placed the tool in the Charter of the City of Memphis many decades before on August 1, 1974.

Again, many longstanding businesses decided not to expand, some decided to move but others forged ahead with zoning applications to OPD to expand in contradiction of the UDC. However, the UDC attempted to rid the community of the use variance authority granted to the Board of Adjustment by enabling legislation and blessed by the Tennessee Supreme Court, so the only option for expansion was the filing of a planned development.⁴¹

4. Vested Rights

Another legal principle that affects a city's ability to address blight through zoning is the law of vested rights. In zoning terms, a right is vested if a building is constructed or a use is established prior to new zoning regulations that would prohibit such construction or use. Nonconformities are created when an existing business, often a business that has operated for decades in a given location, is down-zoned by a community's new zoning regulations. A business claiming vested rights is on the other end of the spectrum: it is a new business, one that has perhaps spurred a change to the community's zoning regulations, that wishes to be a nonconformity. After all, existing as a nonconformity beats the alternative: not existing at all.

For many years, the law governing vested rights in the zoning arena was static, based on a 1939 Tennessee Supreme Court opinion. In that case, the court aligned with many other states in finding that a business could not claim a vested right unless it had (1) a building permit, (2) performed substantial construction and (3) good faith, or no knowledge that the city may try to change its zoning laws to address it.⁴² For obvious reasons, the "substantial

41. See MEMPHIS TENN., CHARTER & RELATED LAWS art. 21, § 157 (2012), https://www.municode.com/library/tn/memphis/codes/charter?nodeId=PTICHRELA_ART21GEZORE_S157PLUNDE.

42. *Howe Realty Co. v. Nashville*, 141 S.W.2d 904 (Tenn. 1940).

construction” aspect of this three-prong test was heavily litigated in the ensuing decades. This all changed in 2014 when the General Assembly revised Tennessee Code Annotated section 13-4-310. This new vesting statute, which took effect on January 1, 2015, removes the substantial construction requirement for a business to claim a vested right in an older set of zoning regulations.⁴³ Instead, he or she need only show that a building permit was obtained. For land use entitlements that do not require building permits, such as subdivision plats and planned developments plans, the preliminary approval of those plats and plans creates a vested right. It is clearly the legislative intent of the State of Tennessee to limit the ability of cities to use their zoning code to address pending businesses, many of which had been historically selected because of the real or perceived blighting effects of that type of business. So, while one source of blight may come in the form of overly strict local zoning regulations that punish longstanding nonconforming businesses, another may come in the form of state action allowing a local government from preventing these nonconformities opening in the first place.

V. LATEST TRENDS IN LAND-USE REGULATION

Today, planners and attorneys across the country are using the zoning and subdivision enabling legislation to craft a new type of codes that more precisely communicate the rules to the end user. This new approach to zoning and subdivision is based on the understanding that the rules that govern downtown or older neighborhoods should be different than those that govern new suburban development. This more modern approach to development codes is called form-based codes. Rather than the use of a property being the primary organizing mechanism for controlling land, as is typically the case under Euclidian zoning, form-based codes place a greater emphasis on the form of the building and create codes that better implement the vision of the community and are easier to navigate.

43. TENN. CODE ANN. § 13-4-310(k)(2) (Supp. 2015).

Form-based codes are also contextually based,⁴⁴ meaning that the right rules are in the right places—urban rules for urban places, suburban rules for suburban places, rural rules for rural places, and natural areas treated as natural areas. Well-crafted form-based codes organize these rules by context or transect at the site, block and neighborhood scale and encourage the appropriate mixing while simplifying the ability to navigate and understand what is expected of the developer.

While land use regulations have been in place for more than ninety years in Memphis and Shelby County, the community has embraced building and other technical codes for a much longer period of time.⁴⁵ In fact, the first building code was adopted by the City of Memphis in 1860.⁴⁶ This early code was updated eleven times before finally being codified into the General Ordinances of the City of Memphis in 1931 as the “Memphis Digest 1931.”⁴⁷ This Code was largely peculiar to Memphis; the city did not embrace a uniform building code until 1967 with the adoption of the Basic Building Code, 1965 Edition, written by the Building Official and Code Administrator International, Inc., or “BOCA.”⁴⁸ The city migrated to the Southern Building Code in 1979 to better align with Shelby County, which had been using the Southern Building Code since 1959.⁴⁹ In early 1984, the Memphis and Shelby County Building Departments merged to create the Office of Construction Code Enforcement.⁵⁰ With this merger came a new uniform building code, the Standard Building Code, 1982 Edition.⁵¹ Since

44. Many codes use the urban to natural transect or T-zones to organize various rules across the complexity of a neighborhood or city. An example of these types of codes is the SmartCodes. *See, e.g.*, CENTER FOR APPLIED TRANSECT STUDIES, <http://transect.org/codes.html> (last visited May 15, 2016). For additional information on the history of zoning and subdivision codes, see THE CODES PROJECT, <http://codesproject.asu.edu> (last visited May 16, 2016). The website, managed by Arizona State University professor Emily Talen, is an anthology of rules and regulations that seeks to create a specific urban form. *Id.*

45. *See* TERRY HUGHES, THE HISTORY OF MEMPHIS AND SHELBY COUNTY TECHNICAL CODES.

46. *Id.* at 1.

47. *Id.*

48. *Id.*

49. *Id.*

50. *See id.* at 2.

51. *See id.*

2005, the community has been utilizing the International Building Code, published by the International Code Council, the “ICC.”⁵²

While many refer to all technical codes as the “building code,” they are in actuality separate codes with separate appellate bodies and required separate adoptions by both the city and county. These include the fuel gas code, the mechanical code, the electrical code, the plumbing code, and perhaps most importantly in relation to regulatory blight, the existing building code.⁵³ The “existing building code” is a term that refers to the building code that is applied to the rehabilitation of existing buildings; therefore, it is also known as the “rehab code.”⁵⁴ Memphis and Shelby County originally adopted a rehab code in 2006 with its adoption of the ICC Existing Building Code, 2003 Edition.

In late 2012, the Memphis City Council and Shelby County Board of Commissioners adopted the 2012 Edition of the ICC Existing Building Code with local amendments recommended by the Memphis and Shelby County Building Code Advisory Board.

Today, there are three key sections of the technical codes that act as “rehab codes” in Memphis and Shelby County: 1) Chapter 34 of the ICC International Building Code, 2) the ICC Existing Building Code, and 3) Appendix C of the ICC Existing Building Code. The table below explains the situations in which each may best be applied[.]

All three sections of the technical codes cited . . . give the Building Official the authority to accept compliance alternatives if he or she finds that strict compliance with each code section in question is impractical; that the alternative conforms with the intent and purpose of the Code and that the pro-

52. *Id.*

53. *See generally id.*

54. For a practical and detailed explanation of the Rehab Codes, see PHILIP MATTERA, GOOD JOBS FIRST, BREAKING THE CODES: HOW STATE AND LOCAL GOVERNMENTS ARE REFORMING BUILDING CODES TO ENCOURAGE REHABILITATION OF EXISTING STRUCTURES 4 (2006).

posed alternative does not lessen any health, life safety, fire safety or structural integrity element required.⁵⁵

	Chapter 34	Existing Building Code	Appendix C
Scope	This section establishes requirements to be met when an existing building is being altered, repaired, added to or undergoing a change in occupancy.	Same as Chapter 34, except there are three methods of obtaining compliance: the prescriptive and work area methods where each element of construction meets a set standard and the performance method where the owner demonstrates on a case-by-case basis that the work is in compliance with all Code requirements.	This section may only be utilized if an existing structure is being converted into apartments.
Seismic Requirements	Use current seismic standards unless the owner demonstrates the existing design loads will provide equivalent performance to that of any system that could be installed in the building.	There are two methods of obtaining compliance: meet the prescribed force level values established in the Building Code or follow the requirements of Standard Reference Methods ASCE 41, using BSE-1 and 2 and the table found in Section 301.1.1.4.1. When using the latter, the structure shall provide at least 75% of the proscribed force level values from the Building Code or comply with Appendix A of the Existing Building Code.	The design loads that were applicable when the building was originally constructed, if any, provided no dangerous condition is created.

55. MEMPHIS & SHELBY CTY. OFFICE OF CONSTR. CODE ENF'T, MEMPHIS AND SHELBY COUNTY REHABILITATION CODE, <https://shelbycountyttn.gov/DocumentCenter/View/23044>.

Alterations	Alterations shall comply with new code requirements and be installed so that the building is no less compliant with the code than it is currently.	Sets three levels of [alterations], based on size and scope. Level 1 alterations, the smallest, must comply with Chapter 7 of the Existing Building Code; Level 2 with Chapters 7 and 8 and Level 3 with Chapters 7 through 9. Regardless of which level the alternations fall under, the resulting structure shall be no less conforming with the code than it was prior to the alteration.	Similar to the Existing Building Code; there are three levels of alterations articulated with progressive requirements for compliance. ⁵⁶
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A. Rehab Codes and Pink Zones

Many cities have adopted what is called a “Rehab Code,” but it is fairly clear that the full potential of these codes has not been realized. Eric Bethany, an urban architect at Kronberg Wall in Atlanta, recently commented on the firm’s blog that his firm “constantly find[s] that local government officials are completely unaware of the importance of the existing building code as a critical tool for redevelopment and reuse of portions of their town, often the cherished buildings along Main Street.”⁵⁷

Early adopters of a Rehab Code included the states of New Jersey, Maryland, Minnesota, and Rhode Island and the cities of Wilmington, Delaware and Wichita, Kansas.⁵⁸ According to the Guide, Rehab Codes are “building and construction codes that encourage the alteration and reuse of existing buildings devel-

56. MEMPHIS & SHELBY CTY. OFFICE OF CONSTR. CODE ENF’T, MEMPHIS AND SHELBY COUNTY REHABILITATION CODE, <https://shelbycountyttn.gov/DocumentCenter/View/23044>.

57. Eric Bethany, *In Praise of the Existing Building Code*, KRONBERG WALL (Sept. 24, 2015), <http://kronbergwall.com/in-praise-of-the-existing-building-code/>.

58. BUILDING TECH., INC., SMART CODES IN YOUR COMMUNITY: A GUIDE TO BUILDING REHABILITATION CODES 3, 12 (2001), <https://www.huduser.gov/Publications/pdf/smartcodes.pdf>.

oped because the building regulatory system in the U.S., including building codes, is a significant impediment to investments in the alteration and reuse of existing buildings. This has led to a complete re-thinking of how existing buildings should be regulated.”⁵⁹

Building Codes are often cited by developers and builders as a barrier to revitalization of existing buildings. However, where Rehab Codes have been adopted, giving broader discretion to the local Building Official, the barrier is more likely in the enforcement than in the language of the applicable ordinances, although the two cannot be readily separated.

The burden of building regulation on this country’s housing builders and developers seems to come less from the actual restrictions of the codes than in their administration. Problems still arise in code creation (codes continue to be far from performance-based) and adoption (most jurisdictions continue to make amendments based on local political conditions rather than on climatic, geological, or material realities). . . . Code enforcement, however, seems to be the most significant barrier to development. . . . Extreme variations in plan reviews and inspections still exist not just between jurisdictions but also increasingly *within* jurisdictions.⁶⁰

There is very little empirical research establishing that Rehab Codes, if enforced as intended, yield the desired result of decreased costs for redevelopment while not compromising life safety concerns. Perhaps one reason for the dearth of research on this topic is the lack of publicly available data that would be necessary to conduct such research. The result is that anecdotal information is relied upon in the crafting of rehab codes, the enforcement of rehab codes, and the efforts of developers and builders to comply with rehab codes. Carlos Martin calls for the development of a methodological approach to measuring and gathering data on how

59. *Id.*

60. Carlos Martin, *Response to “Building Codes and Housing” by David Listokin and David B. Hattis*, 8 CITYSCAPE, no. 1, 2005, app. at 253, 255, <https://www.huduser.gov/periodicals/cityscpe/vol8num1/res1.pdf>.

cities enforce codes as a “first order of business” to address the dearth of research in the field.⁶¹

In an article printed in the same HUD journal focused on regulatory barriers to affordable housing, Peter May detailed the components of regulatory barriers in any development.⁶² May discusses research across the United States that identifies and charts building codes pertaining to affordable housing development on a spectrum from “business friendly” to “by-the-book.”⁶³ He goes on to describe how around the turn of the century efforts at regulatory reform began to “shift in perspective from considering ways to strengthen enforcement to addressing ways to improve compliance[,]” and he uses the research and writing about Rehab Codes as evidence of the success of this approach.⁶⁴

A study of New Jersey’s experience with Rehab Codes found that so called “facilitative enforcement” of Rehab Codes can stimulate residential investment in central city neighborhoods.⁶⁵ While not the only answer, Rehab Codes properly enforced show promise as a local response to Regulatory Blight. As further explained below, more fine-grained approaches are required to turn around specific targeted revitalization clusters, but even there, the power of the Building Official to interpret the “intent” of the building codes may be key.

Regardless of the language of the codes or their enforcement, as noted above, the small size of a very desirable community revitalization project may actually make it impossible as a practical matter. Therefore, cities that hope to spur reinvestment in largely

61. *Id.* at 257.

62. Peter J. May, *Regulatory Implementation: Examining Barriers from Regulatory Processes*, 8 CITYSCAPE, no. 1, 2005, at 209, <https://www.huduser.gov/periodicals/cityscape/vol8num1/ch6.pdf>.

63. *Id.* at 213.

64. *Id.* at 217, 218 (citing Raymond J. Burby et al., *Building Code Enforcement Burdens and Central City Decline*, 66 J. AM. PLAN. ASS’N 143, 154–155 (“Adopting business-friendly approaches will not reverse the movement of industrial, office, and retail businesses from central cities to the suburbs. But these approaches can help cities attract more single-family detached housing (and the population that comes with it) and spur more commercial rehabilitation projects.”)).

65. Raymond J. Burby et al., *Encouraging Residential Rehabilitation with Building Codes: New Jersey’s Experience*, 72 J. AM. PLAN. ASS’N, 183, 191–92 (2006).

blighted areas have the challenge of establishing a mechanism to make small development possible. This approach has been experimented with, and has yielded promising results in many communities. The focused attention, concentration of enforcement and other resources, and regulatory flexibility can make all the difference and can stimulate multiple small projects, whose whole is greater than the sum of its parts.

B. Making Small Possible

While large investments are needed and welcome there remain many neighborhoods in Memphis where it is difficult to develop. Older, distressed, and transitional neighborhoods often do not have the ability to generate rent sufficient to finance the costs of renovation or new construction without subsidies. In these neighborhoods, small commercial buildings (less than 10,000 square feet), small apartment buildings, and vacant single-family homes continue to deteriorate into blighted conditions and reduce surrounding property values while adding cost to city budgets due to maintenance and increases in crime. This is a desperate cycle for neighborhoods and slow-growth cities such as Memphis. So how can this cycle be interrupted?

One approach is to encourage more small, independent developers by reducing the difficulty, costs and time required for small-scale infill development. There is a correlation between the increasing regulations, cost, and time required to complete infill projects and the typical size of the projects. Larger projects are able to absorb the cost associated with the consultant team needed to navigate the system. This requires a degree of experience and sophistication that only a few local developers in Memphis possess. In a relatively slow-growth, weak market city such as Memphis this can leave many small projects and potential “end-user developers” out of the picture. How can policy makers encourage small-scale development in neighborhoods?

The economics of real-estate development are basic. For a project to be viable, the owner must be able to build a building that will cost less to build and operate than the owner receives in rent [$X_{\text{(rents)}} - Y_{\text{(cost to build and operate)}} = Z_{\text{(profit or loss)}}$]. The two variables are the rent generated and the cost to build and operate the building. If the equation is negative then the development loses money and will not likely occur. If it is positive then the project is at least viable. So, in theory, to make this equation positive one would

want to increase rents or decrease costs (or some combination of both).

Rent represents the rental rate or sale price of the property. If rents increase above a certain amount too quickly then issues of displacement and gentrification can emerge. The costs include all hard and soft costs associated with development—planning and entitlements, construction materials and labor, marketing, insurance, taxes, etc. For policy makers interested in promoting small-scale affordable development as a tool to combat blighted neighborhoods, the focus becomes identifying and reducing the regulatory burden and time that can inflate the cost of building rehab and operations.

This leaves cities that want to streamline and remove regulatory barriers to redeveloping blighted properties with a couple of options. Cities may choose to conduct a total reform of regulations including a complete rewrite of the zoning, subdivision, and building regulations. In theory this approach may seem the cleanest, however, this work is complex, expensive, and time consuming. Further, we have not proven to be very good at anticipating necessary reforms on a wholesale basis. Additionally, local politics and a resistance to change may impede total reform of zoning and subdivision codes. Further, state politics and issues of insurability may hinder comprehensive reform of statewide building codes.

Alternatively, cities may choose to work within the current system to improve opportunities for small infill and rehab projects. Cities might implement “Pink Zones”⁶⁶ or overlay zones that create exceptions in zoning and building codes that allow for easier redevelopment of buildings. Additionally cities may look to streamline the approval process to: make it easier for small pro-

66. Pink Zones are designated areas of a city where community members believe a less rigid enforcement of zoning and/or building regulations will yield a more desirable community. See Keith Boyfield & Daniel Greenberg, *Pink Planning*, CENTRE FOR POLICY STUDIES 1 (2014), <http://www.cps.org.uk/files/reports/original/141105085708-PinkPlanning.pdf>. In essence Pink Zones are overlay districts where the regulatory “red tape” is lightened to promote easier and more cost effective infill and redevelopment. *Id.* These are discussed in more detail below in the context of Phoenix, Arizona. Additional information on Pink Codes and other approaches to making small development easier can be found through The Project for Lean Urbanism. Ctr. For Applied Transect Studies, LEAN URBANISM, <http://leanurbanism.org> (last visited May 16, 2016).

jects to get a permit, train planners and code inspectors to be more supportive, and help applicants to find equivalent alternatives that can satisfy the black letter of the law. Further, cities can work with applicants and community members to explain how they are supportive of small redevelopment projects. This type of approach enables innovation and experimentation to occur because small projects represent lower risk projects due their size and scale.

This is the approach taken by the city of Phoenix, Arizona. In addition to rethinking their regulatory paradigm they are also supporting stakeholders in other ways. What follows is a quick overview of some of the steps the city of Phoenix has taken to implement a “Lean Government” approach to build stronger communities, infill and redevelopment of vacant buildings, and test ideas before investing in them. This summary is based on interviews with municipal officials in Phoenix and a well-written white paper on the topic entitled *Lessons from PHX—Embracing Lean Urbanism* by Lysistrata Hall and Braden Kay.⁶⁷

Phoenix, Arizona, is similar to Memphis in that it has more land than it needs. Phoenix is approximately 518 square miles and home to 1.5 million people (about 2,967 people per square mile).⁶⁸ Memphis is about 324 square miles and home to 660,000 people (2,000 people per square mile). Both cities have also been subject to misguided urban renewal policies leaving large swaths of vacant land (40–45% of Phoenix is vacant land). As a result of the failed urban renewal policies of the 70’s–90’s and an increasing regulatory regime,⁶⁹ developers in Phoenix were finding it more cost effective to tear down buildings and build new construction at the edge of the city rather than to rehab existing buildings or infill in historic neighborhoods.

67. Lysistrata Hall & Braden Kay, *Lessons from PHX—Embracing Lean Urbanism*, THE PROJECT FOR LEAN URBANISM (Aug. 18, 2015), <http://leanurbanism.org/publications/lessons-from-phx/>.

68. See Quickfacts, Phoenix City, Arizona, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/0455000,04> (last visited May 16, 2016).

69. The entitlement and permitting processes in Phoenix may take upwards of eighteen months for completion, for projects that align with city policy. Interview by Tommy Pacello with Lysistrata Hall, Neighborhood Specialist, The City of Phoenix Neighborhood Servs. Dep’t (Nov. 17, 2015).

When the 2008 recession stalled suburban greenfield development, city officials recognized that one of the few bright spots in the economy was redevelopment of Phoenix's historic core by local residents and stakeholders through small-incremental infill projects. They began to recognize that existing processes and regulations were preventing residents from participating, let alone contributing, to the revitalization of their neighborhood. Establishing strong working relationships with an organization (thanks to a network of stakeholders), city officials realized the disconnect between their desire to encourage infill and redevelopment and the city's policies that promoted suburban sprawl and demolition of existing buildings. Officials wanted to see areas of the city revitalize and maintain their existing building stock but the city's codes and ordinances were oriented to promote new development over redevelopment and infill. To address this, city officials began to think differently about conventional policies and applied a comprehensive approach to neighborhood revitalization. They began to:

- (1) Build relationships between city staff and residents, businesses, nonprofit and community development groups to create a network of assets to address the challenge.
- (2) Nurture relationships and abilities of stakeholders by co-creating a shared vision between city staff, residents, business groups, and developers.
- (3) Reduce red tape by creating "Pink Zones" or areas of the city with lighter regulations and more place-based standards in an effort to preserve existing buildings and promote redevelopment.
- (4) Fill in the gaps between the existing buildings by adjusting regulations to allow temporary and semi-permanent buildings and uses to activate the area.
- (5) Establish walkable streets using low-cost iterative solutions that demonstrate what is possible for the street.

In Phoenix, government officials identified a challenge, reached out to communities, prototyped regulatory approaches and infrastructure ideas, and implemented the concepts that worked. The work was supported by the administration and had the effect of removing several of the regulatory barriers neighborhood stakeholders were facing in small-scale infill and redevelopment of blighted neighborhoods.⁷⁰

Specifically related to the regulatory approach, the city created “Pink Zones” or areas to promote adaptive reuse. Officials initially identified small pilot areas where buildings of less than 5,000 square feet were subject to lower restrictions related to the zoning, building and technical codes. The program has since expanded citywide and applies to buildings built prior to 2000 that are up to 100,000 square feet. The program includes streamlined process, technical assistance, and cost savings to applicants. Additionally, the city developed a series of overlay zoning districts that further encourages small-scale redevelopment. Further, city departments such as the fire department, solid waste, public works, and environmental compliance (storm water) began to work together to reduce the burdens on infill projects. Finally, the city removed the requirement to bring existing parking lots, sidewalks, and driveways up to the current city code. Comprehensively these regulatory changes combined with the other efforts from the city have made it easier for small-scale adaptive reuse and infill development to take place. At the heart of these reforms is the understanding of the value that residents can deliver to their neighborhood when barriers that prevent from them contributing are reduced. These reforms look to restart historic cycles of revitalization and reduce the need for government agencies to underwrite redevelopment with subsidies that have questionable returns.

70. The City of Phoenix Adaptive Reuse Program outlines many of the exceptions that are available to applicants including issues of storm water retention, toilet fixtures and restrooms, life safety issues, and landscaping standards. See *Adaptive Reuse Policies*, CITY OF PHOENIX, <https://www.phoenix.gov/pdd/services/permitservices/arp/adaptive-reuse-policies> (last visited May 15, 2016).

V. CONCLUSION

We have attempted to shed some light, from the practitioner's perspective, on the barriers to eliminating blight that local land use and building code regulations erect and reinforce, even while local government strives and spends in an effort to eliminate vacancy and abandonment. In some cases, the regulations themselves should be changed to make revitalization possible; in other cases, the answer lies in more creative or facilitative enforcement. We recommend that cities like Memphis, that are serious about neighborhood and community revitalization, identify and focus on small neighborhood target areas and work to find ways to remove regulatory barriers at that level in order to stimulate small redevelopment projects that were previously impossible in that location. Based upon lessons learned in such neighborhood target projects, the broader regulatory structure may be addressed.

Expert knowledge of the regulations themselves—their history in the community, and the mechanisms of enforcement—will be essential to policy makers seeking to remove these barriers.

We believe that contextually applicable local regulations and their enforcement with neighborhood level real estate realities in mind will result in the elimination of blighted properties by market forces in urban areas where development is most needed. It is time for local government operators everywhere to recognize that their own rules are killing any hope of redevelopment of the very neighborhoods they are responsible for nurturing back to economic prosperity.