the project for LEAN URBANISM

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Legislation Affecting Lean

POSITION PAPER

The legislation enabling building codes and other targets of Lean Urbanism is often inspired by straightforward protection of health, safety and welfare, but then comes to serve many other purposes. Environmentalists have sought for many years to reform codes for new buildings to allow greater innovation, and Smart Growth advocates have worked since the '90s to reform building rehab codes. In some ways these efforts have been very successful, while in others they have left in place many impediments to a certain scale of development. This scale of development occurs in the inner city and in severely damaged suburbs and rural villages, and becomes more valuable to a locality when the market for larger-scale development disappears and is very sensitive to cost, delay and complexity. Additionally, legislative interventions are necessary to remove regulatory barriers that inhibit robust development at this scale. The method for identifying appropriate legislative adjustments to the building codes can be applied to other regulatory scenes which interfere with the revitalization of neighborhoods.

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Context

The Code of Hammurabic (1800 B.C.) made the construction of shoddy buildings that resulted in death a capital crime. Through the years, urban areas around the world developed codes in response to catastrophic events such as major fires, earthquakes and hurricanes. Modern, uniform building codes began with the 1897 publication of NFPA's National Electrical Code® (see The Value and Impact of Building Code, Vaughan & Turn) and the 1927 publication of the Uniform Building Code. Building codes are not intended to protect against all hazards, but set the minimum legal standards for building practices. While some post-disaster studies have projected the number of lives saved by having made buildings resistant to earthquakes or hurricanes, it is impossible to determine how many lives have been saved through a mechanism to assure that structures were safe, specified wiring was installed, and smoke alarms and fire doors worked as they should. Although building codes continue to evolve in response to the occurrence of deadly, natural events, they have come to serve a broader range of purposes:

- Safety
  - Safety of occupants (children, elderly, disabled, poor, etc.)
    - + fire: materials; firewalls; fire exits and emergency lighting; sources of fire
    - + structural: won't fall down; roof support; withstand earthquakes, hurricanes, tornados, terrorists and floods
    - + materials: aren't toxic nor become toxic when burned
    - + electrical: won't shock occupants
    - + water: non-potable won't get mixed with potable
    - + waste: toxic gases won't enter building
    - + elevators and boilers: won't fall or explode
  - Safety of others (neighbors, city-as-a-whole, responders)
    - + fire: responders safe; fire won't carry to surrounding buildings
    - + flood: prevent damage to others from the building breaking up
    - + structural: windows won't fall on passersby
- Confirmation of expectations where would be difficult for the individual consumer (e.g. concrete or sealed walls) or a company (e.g. an insurer)
- Occupant health
  - Light
  - Air quality
  - Mold
  - Toxic materials
- Public policy
  - universal accessibility
  - waste reduction
  - energy use and carbon production
  - brownfields impacts
  - historic preservation
  - sustainability
  - provide a uniform and efficient services at a lower price trash could be privately obtained
- Industry benefit

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- codification of best practices means that developer's do not have to worry about competitors under-cutting their prices by only pretending to have desired practices
- reduce costs of goods and services because unions can train for the code and manufacturers can make uniform products across jurisdictions
- uniformity improves consistent quality and sets baseline consumer expectation

The extent of allowable purposes varies from state to state, but pretty much universally allows the implementation of detailed building and structured codes, utility codes and fire codes. Federally mandated codes add accessibility requirements to codes. Other applicable building codes may include voluntary energy and sustainability codes. Additionally there are typically inspection requirements as work progresses and certification requirements for the professionals such as architects and engineers who prepare plans. There may be more standards applicable if an owner voluntarily elects to use a particular funding source such as a historic tax credit.

Unlike other top down, government-driven standards, American building codes are developed from the grassroots up and utilize an extended, typically transparent, process to reach consensus on health and safety issues and economic value, and take into account scientific and engineering principles and the experience of construction professionals, regulators and product manufactures. They are usually reviewed every three years, with anyone able to advance change proposals, and when they are adopted by states or localities, those entities may tailor the provisions, often with wide discretion.

Adoption mechanisms vary from state-to-state with some states adopting the codes for statewide use and other states allowing each jurisdiction the option of adopting the state approved code and some states leaving the entire process to the locality. While there are still substantial rural areas that have no building codes, (see No Building Codes: A Guide to States with No Building Codes, Terry Herb, e-book) their numbers are shrinking and most urban areas have building codes.

In the '60's code reform focused on the inconsistency of building codes between jurisdictions but the '90's brought two separate reform attempts. For several decades advocates of alternative building design have laid siege to building codes to try to permit more sustainable designs such as green roofs, hay bale, adobe and other houses, and practical accommodations such as outdoor lighting being allowed in living trees that would last decades without toxins as opposed to creosote phone poles. (see the work of David Eisenberg at the Development Center for Appropriate Technology and the 2009 publication Code, Regulatory and Systemic Barriers Affecting Living Building Projects and the even more useful Breaking Down the Barriers: Challenges and Solutions to Code Approval of Green Building (2002)). The second group that sought code reform were smart growth advocates who had identified the existing codes as barriers to the type of city redevelopment that they wanted to encourage. While there had been earlier efforts, in January, 1998, New Jersey stimulated significant redevelopment with the creation of a Rehab Subcode. HUD tried to adapt the innovations and principles of the NJ code into a model rehabilitation code in its published Nationally Applicable Recommended Rehabilitation Provisions ("NARRP"). Numerous localities created what HUD called "smartcodes" in response to the NJ subcode or NARRP. In 2001 the International Conference of Building Officials revised its Uniform Code for Building Conservation into the Uniform Code for Existing Building, reflecting many of the NARRP concepts, leading to more local adoptions. (see *Smart Codes in Your Community: A Guide to Building Rehabilitation Codes*, HUD (2001); *Breaking the Codes: How State and Local Governments are Reforming Building Codes to Encourage Rehabilitation of Existing Structures*, Philip Mattera of Good Jobs First (2006) and *Model Legislation for Building Rehabilitation Codes*, **Center for State Innovation**). This undertaking has been extremely successful, with wide spread adoption of the Rehab Codes. These have been carefully crafted to fold into the existing system with its balance of competing and complimentary goals. In some instances state adoption has been so quick that jurisdictions are not even aware the new tool has been created.

The building process is like a scale with one side of this scale as the "willingness to proceed with the regulated undertaking." This willingness increases when the specific market is hot, financing is easy, the product type is desired by people who can pay for it, etc. On the other side of the scale is all of the regulatory process that has accreted over time — its complexities, its costs and its implementation bureaucracy. In a robust market the Rehab Codes were adjusted to right the scale — to eliminate the requirement that existing buildings be treated like new buildings. This approach is appropriate for places with the correct market conditions to support this new level of regulation and has stimulated success. But what about those places where the "willingness to proceed with the regulated undertaking" side of the scale has gotten lighter and lighter as market conditions worsened? There, the level of regulation that can throw the scale out of balance must get much lighter — lighter than the Rehab Code reforms have achieved. This is the goal of Lean Urbanism, across a front of regulations that include existing buildings as well as new, and include many other regulatory aspects of urban life.

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Response

The law does not require that a locality regulate buildings, it merely enables such regulation for health, safety and welfare purposes. When an entity begins regulating, then it has potential liability — did it require something that was unsafe or did it fail to do something that it reasonably should have done and harm came from this failure? Individuals acting as part of the regulatory apparatus may have liability if they act outside the range of appropriate conduct. "Sovereign immunity" and its cousin "governmental immunity" would shield many governmental acts from liability. For those entities that are considered parts of the state the immunity begins as absolute. So, for example, in North Carolina, counties are considered part of the state governance and have sovereign immunity. Municipalities, however, are governing corporations in North Carolina, and they have "governmental immunity" for those acts that are part of their governance function (like police) but no immunity for their corporate functions (like operation of a natural gas distribution line). In the mid-1900s a trend toward government accountability began to erode immunity, and in 1946 the federal government passed the Federal Tort Claims Act waiving immunity for certain negligent actions stimulating many states to enact similar acts applying to their entities and employees. States have passed "claims acts" that may allow claims other than torts, and many have created caps or judgments or prohibit punitive damages (see National Conference of State Legislatures' website for a table of provisions). "There is a growing trend holding local governments liable for personal injuries and loss of property resulting from negligent building inspections by municipal officials." (see Joyce E. Levowitx, Privatization of Building Inspection Function: An Alternative to Municipal Liability, 34 Wash. U.J. Urb. & Contemp. L. 267 (1988).

When society/government determines that an outcome is more desirable, it may choose to tolerate a higher level of risk than could be achieved with greater regulation, even if some portion of the risk is to vulnerable parties. Examples include:

- Operation of nuclear power plants;
- Allowing climbing and camping in National Parks;
- Allowing sale of alcohol, cigarettes or guns, and
- Allowing higher speed limits or not mandating high tech safety devices on all cars.

It is often more difficult to reduce existing regulations than to forego them in the first place. The factors influencing whether a government body will reduce existing regulations are: a) desirability of the regulate activity; b) belief that the targeted regulation actually precludes or interferes with the activity; c) degree to which liability is increased by removal of the regulation, d) nature of the protected parties and their ability to protect themselves and e) risk of and predictability of unintended consequences of regulatory change.

In describing the purpose of the regulatory change in enabling legislation, or in the ordinances themselves, it will be important to describe the specific circumstances that create the need for making the regulations Lean, whether they are economic devastation, depopulation or lack of investment, and the desired outcomes such as stimulating small, entrepreneurial investment, improving the coherence of neighborhoods or improving the ability of people of limited means to repopulate neighborhoods. The ability to define the specific area of impact or type of building impacted will be critical.

There is a tendency when attacking regulatory accretion to lump together different kinds of regulatory adjustments. Regulations may be a barrier because they are complex and overly prescriptive:

> …[W]ithout a massive reduction in its current functions, government can be far more effective, far less confusing, far less counterproductive, and far more helpful if it opts, wherever it can, for greater simplicity. …[W]hat we need is fewer rules and more discretion…. Too much of the time, the government tells people exactly what to do and exactly how to do it… rather than just describing its general goal and letting human beings use their own creativity and initiative to get there. (see *Simpler: The Future of Government*, Cass R. Sunstein (2013); see also *Nudge* by the same author with Richard Thaler).

But note that in simplifying, there is no change in the goals. Consequently, it is less controversial. Another type of regulatory adjustment is to re-balance — that is to dial back the potential achievement of a regulatory goal in order to increase the likelihood of achieving another. For example, a locality may choose to reduce universal access, energy efficiency and safety standards in order to preserve a historic building. Both complexity and the cost of compliance may be barriers, but they must be approached differently and separated from those elements that are simply a bureaucratic hassle. These later may be a nuisance; their removal may improve the ease of achieving the desired goal but at the same time if removal isn't easy, the fight to reduce these may reduce the likelihood of removal of true barriers and therefore sacrifice the good for the perfect, a common failing in regulatory reform efforts. For example, fighting for urban roosters under the auspices of they are not noisier than morning trucks may cause a group to lose the right for urban, egg-laying chickens.

Clarification or expansion of sovereign/governmental immunity may be one of the most important, and most overlooked, aspects of achieving regulatory reform in buildings. Particularly when they are allowing exceptions to existing safety standards, public officials and the attorneys for lo-

calities, are often extremely concerned about their liability exposure. Clearly establishing the absence of liability, under state law and city charter (which is different than determining whether someone will sue) may be the most important step, followed by the search for a reasonable legislative or insurance fix in the event that there is liability. This effort may encounter resistance from the plaintiffs' bar and consumer advocates.

Careful understanding of the parties who are protected by a regulation is necessary to assess the likelihood of a successful regulatory diet and tailor enabling legislation. Despite discussions of the "nanny state," among the easiest regulations to change are those where an individual can opt for less safety, or less protection, provided that they have sufficient information to make a knowledgeable choice. It appears that the next easiest is the adjustment of regulations for the general good. The hardest are those that have been implemented for the specific protection of someone with a disadvantage — children, the elderly, the poor etc. Though some may argue that the law is slow to protect the disadvantaged, once in place such regulations are difficult to remove. Lean enabling legislation and the resulting regulations are more likely to be enabled where the risk that is addressed is to individuals who are informed of the risk and can choose to accept it. Similarly regulations can be reduced where the risk is to the general public and the public representatives can balance the risk with the desirability of development.

The last factor in creating or assessing enabling legislation for or proposals for regulatory diets is the risk of unintended consequences. Imagine assessing two different approaches to reconstructing a depopulated neighborhood, in one case with no existing, recoverable buildings and in the other with such buildings. In one approach the building regulations are replaced with a provision enabling registered architects to certify the finished buildings as having met a broad set of performance criteria (structurally sound, fire safe, etc.) and in the other approach the use of modular units meeting identified code standards is facilitated. In the setting where new buildings are being constructed the modular approach may have an advantage. It already has a system for approving code compliance in the factory, for introducing innovation which is approved by third party certifiers and insurance appropriate for the role of builder. Products can be attached or detached single-family, multifamily or commercial. The risks are that the product can be ugly, quality control can be weak and the modular company could go out of business and not be available to address claims. The architect certifier must not only provide the design, but oversee the construction to assure that specs are followed in hidden areas since it is the constructed building being certified, not just a design. The architect would need to be versed in the different safety requirements necessary for single family, multifamily and commercial, but may not have the scale of work to justify developing expertise in all areas. In substituting for the building inspector, the architect is likely taking on a level of liability not covered by its insurer, and not necessarily available for coverage. This challenge gets more acute the less prescriptive the code, because the only determination of safety may be that of the architect. Risks include that the product may still be ugly, quality control can be weak, the many architects who could provide the service would have wildly varying expertise which the public would have difficulty assessing and few of them would have the means or assets to pay building failure claims. Insurance, if available would likely be expensive, making this approach less economical than public inspectors, especially since several years of "tail" coverage would be necessary.

In the rehab/retrofit setting, however, the analysis of unintended risks is quite different. The modular industry is not useful in this setting, for while it might supply components, these could only be utilized under the direction of an architect or engineer. The architect is dealing with a building that has already stood the test of time and is inspecting a limited array of interventions, necessary for the restoration of any attributes lost over time (such as structural soundness) and the safety or completeness of renovations. Obviously, the scale of building renovation impacts this analysis from both the risk and the economic exposure side, but for a range of buildings the unintended risks of this approach might be acceptable.

One of the other problems associated with building codes and their management by cities has been the unwillingness of city officials to approve innovations. David Eisenberg has fought this problem for years and ultimately decided that there was no winning strategy other than a change in the codes themselves. Even when a department receives top down instructions to allow innovations, there is little incentive to risk liability or job loss for a failed innovation. David also reported that approval in another jurisdiction rarely streamlines approval.

It is possible that technological innovations could address this and other challenges in areas desiring Lean building regulations. One function of building permits is to create a record of the work on a building. Public files are no longer the only potential platform for such records. For example some cities now have programs where building energy use appears in the MLS listing. Small scale "DIY" projects could be allowed without the necessity of permits/compliance but still allow inspection on behalf of a buyer who can access an MLS where the homeowner is required to explain the improvement.

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For those projects that do need innovation approval, the approved technique with any caveats could be posted to a Wiki site and when three jurisdictions have approved it, the building ordinance could shift the innovation from being a discretionary proposal to being presumptively allowed unless the building official can provide a compelling health, safety and welfare reason otherwise. Such reasons could be challenged in court with the burden of proof on the official. If the official's reason is a concern regarding impact on neighbors the applicant would have the ability to provide waivers from them and proceed.

There may be an opportunity to introduce an app that streamlines the process. A company focusing on home improvements for aging in place (Remain Home Solutions) provides home assessments, design specifications, financing and construction management through an app interface. A locality could create a similar app to support renovation in its identified renovation districts, allowing not just on-line application and review, but creating a platform for third party advisors, such as a trio of architects experienced in rehab, to weigh in on proposed innovations and for retaining and referencing precedent approvals.

Another streamlining approach to the inspection portion of the regulatory process would be to allow a property owner to video the construction, including things like wall sections, and file the videos with the building department. The department might do random reviews or might review the videos before providing a certificate. This would eliminate inspection delays and allow greater efficiency. Retained files might be reviewed by subsequent purchasers rather than issuing some sort of final certificate.

Potential Legislation

- State implementation of NARRP or International Existing Building Code
- Legislation permitting creation of redevelopment zones or redevelopment building types
- Legislation authorizing video inspection and automatic approval if haven't heard form inspectors in 24 hours
- Legislation allowing the HOA to inspect and approve small scale home improvements
- Legislation allowing architects and engineers to certify building completion in accordance with plans
- Legislation allowing Wiki approach to innovation approval
- Legislation clarifying or expanding sovereign/governmental immunity of locality and building officials
- Legislation allowing disclosure of small scale improvements and rehab through MLS systems, Zillow or similar private information paths

Related Areas of Inquiry

The following areas have similar regulatory issues and may benefit from the same types of analysis and enabling legislation as well as being instructive in the ways they have resolved their regulatory challenges:

- urban farm lands and uses
- small scale meat processing
- mobile street vendors
- use of reuse or gray water
- microgrids and islandability of solar generation
- modular home industry
- food preparation for sale to public
- group homes
- farmers markets/flea markets
- base jumping
- light planes construction and operation
- Vancouver homeless swap meets and public space policies
- medical marijuana
- historic restoration
- antique car licensing for road use
- hiking and camping in bear zones of National Parks

Conclusion

Regulations have accreted over time as market conditions, a robust economy and other factors allowed desired undertakings to proceed despite complex and financially burdensome regulations and enforcement regimes. As those market conditions have changed in urban, suburban and rural areas, the regulatory regimes have brought many desirable activities — the rehabilitation of old buildings, the creation of small food businesses, the reestablishment of neighborhoods, among others — to a halt.

To reactivate these activities, regulations must be rethought and recreated in a Leaner, more effective form. To be effective, regulatory changes and their authorizing legislation must address factors such as tort immunity, limited areas of application, and clarification that protection of disadvantaged social groups will continue in order to be approved.

Dan Slone is a partner in the Richmond office of the international law firm McGuireWoods LLP. He represents property owners and localities developing innovative new land use strategies for more sustainable developments and open spaces, and he counsels product manufacturers regarding the unique opportunities and impediments facing green products. Over the last decade, Dan has represented numerous national and international nonprofits such as the USGBC, the Congress for the New Urbanism, the World Green Building Council and EcoDistricts. He serves on the boards of several nonprofits, including the Congress for the New Urbanism, the Form-Based Codes Institute, and Bioregional North America (One Planet Communities).

In 2008 Dan and co-author Doris Goldstein wrote *A Legal Guide to Urban and Sustainable Development for Planners, Developers and Architects*. In 2007 the ULI published *Developing Sustainable Planned Communities*, which includes Dan's chapter, "Maintaining Sustainability." In August 2009 the ABA released *Green Building and Sustainable Development: The Practical Legal Guide*, which contains a chapter Dan wrote. Dan has written chapters on energy and legal arrangements in a book on eco-industrial development and a chapter in a recent book entitled *Sustainable and Resilient Communities*. He has numerous other publications, and speaks internationally on urbanism, sustainability, resilience and adaptation.

The Project for Lean Urbanism is managed by the Center for Applied Transect Studies. The Project is supported by the John S. and James L. Knight Foundation and the Kresge Foundation.