



**Form Based Codes
Legal Considerations**

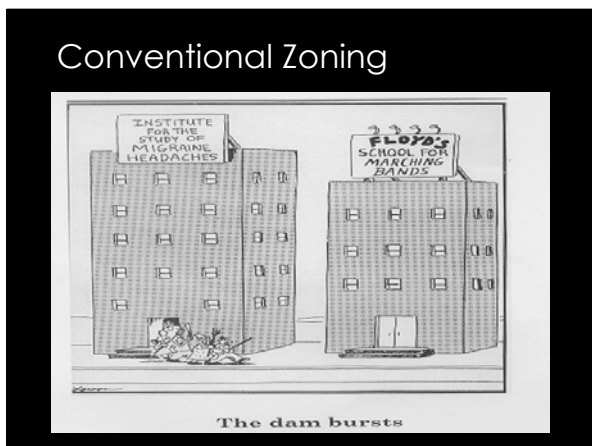
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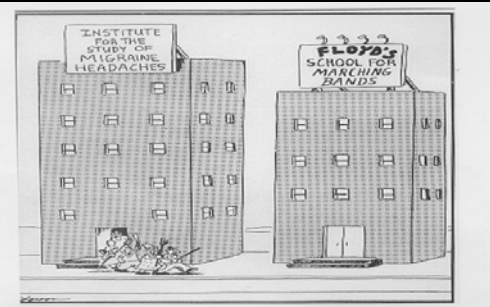


Introduction

- What is a code?
- What role does a code play in the development process?
- What are the legal issues?
- What are the options?



Conventional Zoning




The dam bursts

Retail sf/capita



- ↑ 38% over 18 years
 - 1986 - 14.74 sf
 - 2004 - 20.32 sf


Uncivic Design



New Home Construction			
	1976	2002	%
Average building sf	1,700	2,320	36%
Average lot size (sf)	10,125	16,454	63%

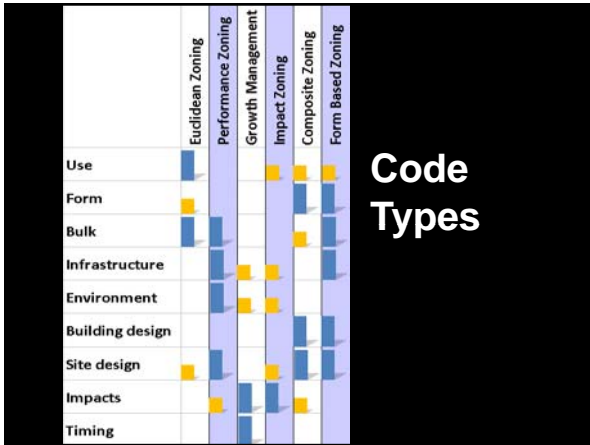
What is a Code?

- Law
- Substantive rules
- Procedural rules
- Mediation
- Dictionary
- Bridge
- Enabler



Code Ingredients

- Applicability – mandatory or optional?
- Plan consistency
- Standards
- Procedures
- Nonconformities & vested rights
- Appeals
- Legal boilerplate



"Form-based codes address the **relationship between building facades and the public realm**, the **form and mass of buildings in relation to one another**, and the **scale and types of streets and blocks**.

The regulations and standards in Form-based codes, presented in both diagrams and words, are keyed to a **regulating plan** that designates the appropriate form and scale (and therefore, character) of development rather than only distinctions in land-use types.

This is in contrast to conventional zoning's focus on the **micromanagement** and **segregation of land uses**, and the control of development intensity through abstract and uncoordinated parameters (e.g., FAR, dwellings per acre, setbacks, parking ratios, traffic LOS) to the neglect of an integrated built form. Not to be confused with design guidelines or general statements of policy, Form-based codes are regulatory, not advisory."

Source:
Form Based Codes Institute, at <http://www.formbasedcodes.org/definition.html>

Form-Based Code Ingredients

Building + Lot + Infrastructure = Form

Zoning

Subdivision

Form Based Code Elements

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

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

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

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

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

Source:
Form Based Codes Institute, at
<http://www.formbasedcodes.org/definition.html>

Form-Based Code Models

- Models
 - Smartcode™
 - Arlington Pike Form-Based Code
 - Wisconsin Model Code
 - CNU Codes project
- Characteristics
 - Stand-alone codes
 - No integration with conventional zoning
 - Transect-based zoning
 - Alternatives v. No alternatives
 - Uses NU jargon
 - Requires powerful constituency

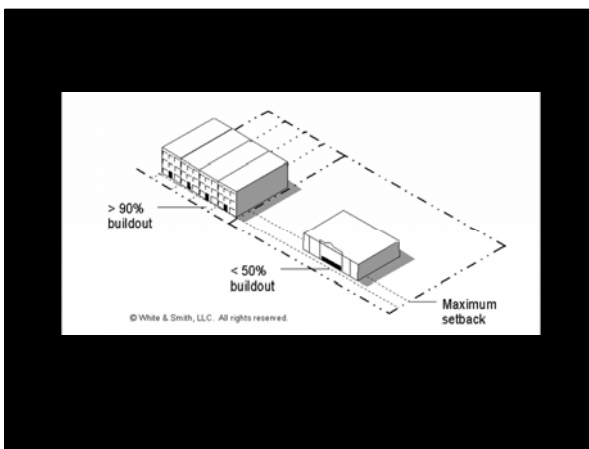
Top 10 New Urbanist Jargon Words and Phrases

- 10. Centroidal
- 9. Enfront
- 8. Regulating Plan
- 7. Essence of Proximity
- 6. Human Scale
- 5. Building Disposition
- 4. Pedestrian Shed
- 3. Charrette
- 2. Immersive Environment
- 1. Transect



Source: Duany Plater-Zyberk & Co.

Standard	Zoning	Subdivision
Building design / proportions		
<i>Minimum height</i>	□	
<i>Minimum / max. stories</i>	■	
<i>Fenestration</i>	□	
Lot disposition		
<i>Max. front setback</i>	■	
<i>Max. side setback</i>	■	
<i>Min. frontage buildout</i>	■	
<i>Parking - location</i>	■	
<i>Parking - ratios</i>	■	
Infrastructure		
<i>Streetscaping</i>	■	■
<i>Street typologies</i>	■	■



New Urbanist / Form Based v. Transit Oriented Development Codes

<i>Standard</i>	<i>NU/FBZ</i>	<i>TOD</i>
<i>Use restrictions</i>	Diminished	Critical
<i>Scale</i>	Building envelope	Minimums
<i>Street standards</i>	Pedestrians	Pedestrian & transit
<i>Civic spaces</i>	Neighborhood scaled	Urban scaled
<i>Parking</i>	Hidden	Capped

Myths & facts

- **Myth:** Developers do not produce good communities because zoning makes them illegal
- **Reality:**
 - Nearly all zoning ordinances allow PUD
 - Most NU communities were built under PUD, NOT a New Urbanist Code
 - BUT, PUD creates obstacles: (1) discretionary (2) not address ancillary standards that can destroy good urbanism (streets, parking, buffers, SWM)
 - Same obstacles exist for multiple use "pod" PUD
 - Form-based codes make better community design a by right option

Paranoia
Uncertainty
Delay



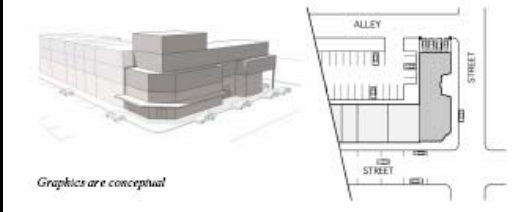
Myths & facts

- Form Based Codes regulate architectural style



Myths & facts

- Form Based Codes do not regulate use



Graphics are conceptual

a. Podium Building.

i. Description. A Podium building has one or more floors which meet the minimum setback requirement as determined by Form Based Zones, with upper floors stepping back to reduce impact of height.

ii. Access. The primary entry to each individual unit on the ground street façade shall have direct access to the street. Access to upper floor offices, residential and commercial units shall be via a ground floor lobby with direct access to the street. Parking, loading and trash disposal shall be accessed from an alley or shared side drive aisle.

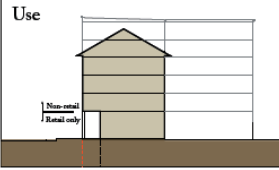
iii. Parking. Parking shall be located the rear portion of the lot or under the principal building or a common parking area may be located interior to the block.

iv. Frontage. Ground level Frontage Types along the street shall be Store Fronts, Offices, Cafés, and/or Lobbies and may also include Portals, Forecourts, Courts, and/or Patios.

v. Massing. Upper floors may step back. Where the zone permits more than three stories, the fourth story and above shall be setback at least 8 feet from the front building plane.

B. Building Envelope Standards: Shopfront Colonnade Sites

Use



Ground Story
The GROUND STORY shall house RETAIL uses. See Height specifications above for the specific requirements.


Upper Stories
The upper STORIES shall house residential or COMMERCE uses excluding RETAIL SPECIALTY and RETAIL TRADE uses (except those that have direct RBL frontage and are second STORY extensions of the GROUND STORY use).

Farmer's Branch Station Area Form Based Code

West Village (Dallas)

Residential →

Retail →





Alternatives to traditional zoning have arisen over the years, such as "form based zoning" or "mixed use zoning." S. Mark White, *Classifying and Defining Uses and Building Forms: Land-Use Coding for Zoning Regulations*, American Planning Association Zoning Practice, Sept. 2005, at 2-3; Sonia Hirt, *The Devil is in the Definitions*, 73 Journal of the American Planning Association, at 436 (Autumn 2007). "[F]orm-based zoning" is the latest trend in the planning profession." White, *supra*, at 3. It is "based on the theory that design controls can resolve inconsistencies between land uses. Design controls for [form-based zoning] ordinances include building envelope standards, building frontage requirements, fenestration (window and entryway), facade coverage, and traditional facade modulation techniques." *Id.* at 2. In contrast, "mixed use zoning" mixes a number of different uses in respective zones rather than limiting mixed uses. Hirt, *supra*, at 436. Many urbanists believe that mixed use districts are the key to restoring vibrancy to American cities. *Id.* However, traditional "use districting remains the mainstay of most zoning ordinances" and "this is expected to continue for the foreseeable future." White, *supra*, at 3.

Town of Rhine v. Bizzell, 311 Wis.2d 1, 15, 751 N.W.2d 780, 787 n. 6 (2008)

Myths & facts

- Myth: "Codes should tell applicants what they can do, not what they cannot do"





Myths & facts

- Myth: the plan will make this all happen
- Reality:
 - Plans are not legally binding
 - Codes are legally binding
 - Codes are based on the plan
 - Infrastructure is important too
- Solution: develop a strong mandatory or incentive-based code

Myths & facts

- Myth: "Developers will produce better communities if the Codes will only show them how to do it"
- Reality:
 - Perception: consumers want privacy and security
 - Auto-centric transportation systems beget sprawl, not bad codes
- Solutions:
 - Developers need strong incentives (or mandates)
 - Community needs multi-modal transportation systems

Reference: Alex Marshall, *How Cities Work: Sprawl, and the Roads Not Taken* (Austin: University of Texas Press, 2000)

Myths & facts

- **Myth: "A shorter ordinance is easier to understand"**
- **Reality:**
 - Definitions and concepts need some text
 - Easier conceptually does not mean easier to implement
 - Short ordinances tend to create undue discretion
 - Legal issues
 - Discourages use
- **Solution:**
 - Establish only those standards that are necessary

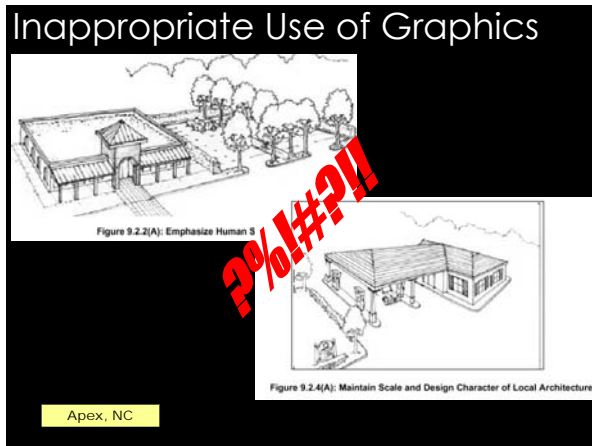
Myths and Facts

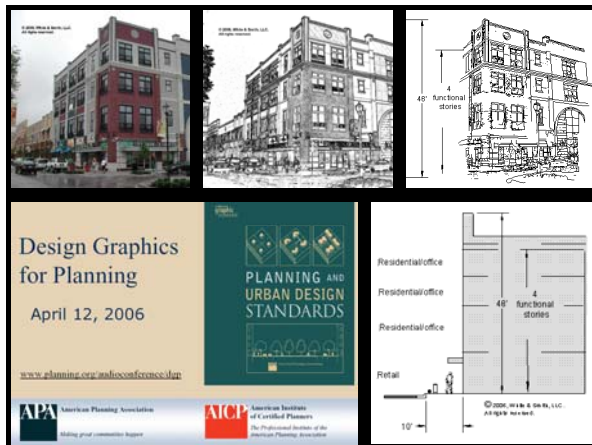
- "Graphics undermine the legality of the code"
- **Facts:**
 - The law does not require long documents
 - The law does not require obtuse language

Myths and Facts

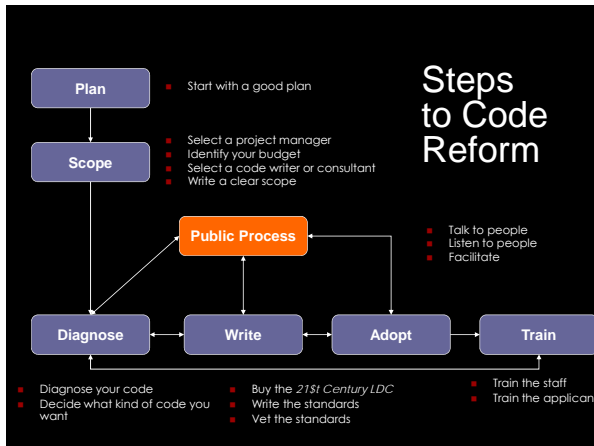
- Form based code = Graphics
- Graphics = Form Based Code

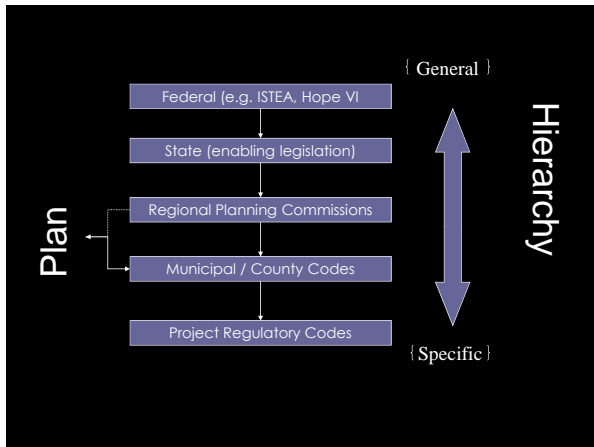
Cautionary note:
Consider the software application carefully!

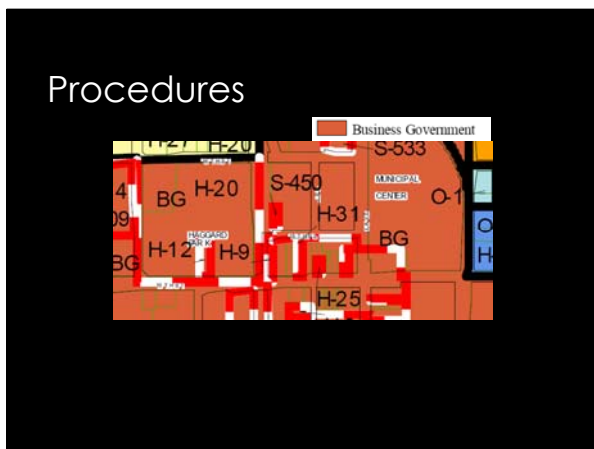




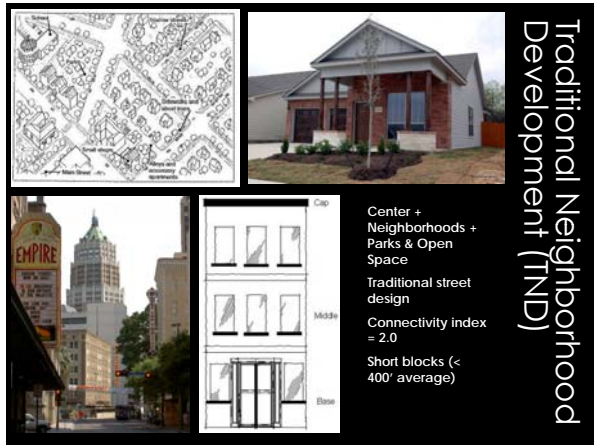














Local Authority

Preemption

- General Police Powers
- Grants of Authority

Standard Zoning Enabling Act

- SECTION 1. GRANT OF POWER.—For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body ... [may] regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.

Standard Zoning Enabling Act

- SEC. 2. DISTRICTS. ... within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures, or land.

Restigouche v. Jupiter (11th Cir. 1995)

- Road Corridor study implemented by prohibiting automobile campus
- "Goal of creating an identifiable, traditional downtown" **legitimate public purpose**
- Encouraging retail uses and prohibiting car dealerships furthers public purpose:
 - auto purchase not an everyday need
 - large auto lot breaks up pedestrian flow
 - dealerships disrupt planned residential character

Marshall v. Salt Lake City (Utah 1943)

- Residential "C" district created small "utility zones" for neighborhood conveniences
- Spot zoning challenge rejected:
 - "Here the general zoning plan of the city set within a *reasonable walking distance* of all homes in Residential "A" districts the possibilities of such homes securing daily family conveniences and necessities, such as groceries drugs, and gasoline for the family car, with fee air for the tires and water for the radiator, so the wife and mother can maintain in harmonious operation the family home, without calling Dad from his work to run errands."

Purser v. Mecklenburg County (NC.App. (1997)

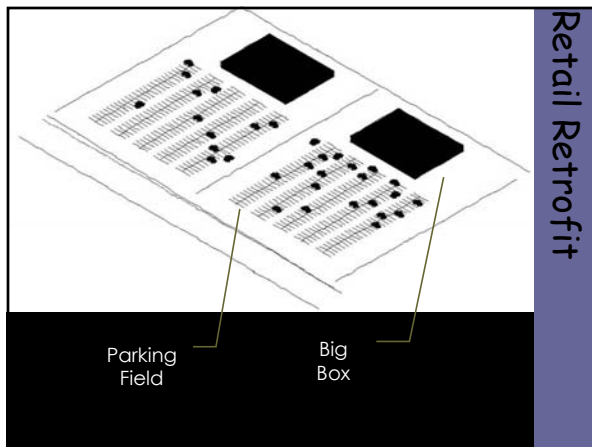
- Generalized Land Plan and General Development Policies District Plan (GDP)
- GDP provision for Mixed-Use & Commercial Centers & Neighborhood Mixed-Use Centers
- Plan amendment process
- Spot zoning challenge rejected: "philosophy of NCC "was to allow those who live nearby to walk or travel very short distances for goods to meet their daily needs."

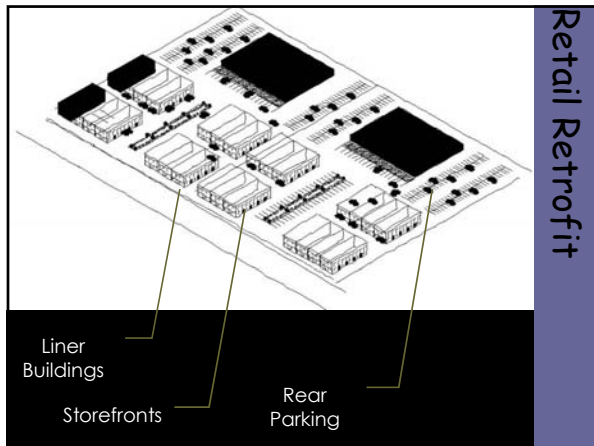
J.D. Construction v. BOA (N.J. Super. 1972)

- "In single family residential zones any parking facilities with a capacity of more than four (4) vehicles shall be permitted only in a side or rear yard."
- H: (1) no reasonable relationship to zoning purposes (N.J. anti-aesthetic rule); (2) vague

Responding to *J.D. Construction*

- No constitutional obligation to zone sufficient space for off-street parking (*State v. Rush* (Me. 1974))
- Landscaping requirements for parking lots not a taking (*Parking Association v. Atlanta* (Ga. 1994))
- Updated planning legislation
- New Jersey





Dallen v. KC (Mo.App. 1992)

- Special Main Street Corridor Review District
- Enabling ordinances prohibited modifications of use restrictions in underlying district
- H: Ten (10) foot maximum setback invalid as applied to gas station
- What in the !@\$# constitutes "rural, rustic or non-urban characteristics"?!?!?

Responding to Dallen

- Findings
 - Need for restrictions relating to zoning purposes
 - property values
 - traffic congestion
 - pedestrian safety
 - Careful drafting

*Dallen v.
Kansas City*



*Gas
Backwards*



*City of North Miami v.
Newsome (Fla.App. 1987)*

- "All main buildings or structures must have a minimum floor area of two thousand, five hundred (2,500) square feet"
- "All facades or false fronts of or to buildings shall be at least fifteen (15) feet in height"
- Not tied to lot size
- Held:
 - No authority
 - Arbitrary, unreasonable and has no relation to public health, safety, or welfare

**Responding to Minimum
Height Cases**


- Findings
- Graphics
- Updated state planning legislation ("innovative land use controls") (F.S. § 163.3202)
- Voluntary restrictions (e.g., development agreements, conservation easements)

Due Process - Vagueness

- Legal Concerns
 - Graphics / "postcard" ordinances
 - Compatibility
 - Urban Design
- Policy Concerns
 - Vague ordinances discourage use
 - Vague ordinances invite abuse
 - Vague ordinances do not always produce right outcome

Vagueness Principles

- Applicability
 - Ordinance forbids/requires an act
 - Persons of common intelligence must guess at meaning and will differ as to application
- Concerns
 - Due process / notice
 - Arbitrary enforcement
 - Ambiguities favor landowners




Vagueness Principles

- Technical words
- Criminal v. non-criminal statutes
- Administrative v. legislative decisions
- Well-settled common law meaning
- Impossible standards of specificity
- Procedural safeguards

Anderson v. Issaquah (Wash.App. 1993)

- "Buildings shall be made compatible with adjacent buildings ..."
- "Evaluation ... based on quality of its design and relationship to the natural setting ..."
- "Building components ... shall have appropriate proportions and relationship to each other ..."
- "Colors shall be harmonious ..."
- "Monotony of design ... shall be avoided ..."
- "Efforts shall be made to create an interesting project ..."



Building design (Aesthetic v. Function)



Copyright issues

- *Veeck v. Southern Building Code Congress*, 293 F.3d 791 (5th Cir. 2002)
 - Municipal law
versus
 - Private codes

Resources

- *A Legal Guide to Urban Design for Planners, Architects and Developers* (Wiley, 2008)
- Freilich & White, *21st Century Land Development Code* (APA, forthcoming)
- White & Jourdan, "Neotraditional Development: A Legal Analysis," *Land Use Law & Zoning Digest*, at 3 (Aug. 1997)
- E. Garvin, *Understanding Form Based Regulations* (International Municipal Lawyers Association, Portland, Oregon – September 18, 2006)
- Sitkowski & Ohm, "Form-Based Land Development Regulations," *38 Urban Lawyer* 163 (2006)

21st Century Land Development Code (forthcoming – APA)

- General Use Patterns
- Zoning
- Procedures
- Development Standards
- Adequate Public Facilities
- Supplemental Use Regulations
- Nonconformities / Vested Rights
- Agencies
- Legal Status

- Definitions
- Submittal
- Bibliography

Text
Commentary

Family Of Five Found Alive In Suburbs


BUFFALO GROVE, Ill.—The Hobapples family, long feared missing or spiritually dead, was found alive in the Chicago suburbs Monday, somewhere managing to survive in the hostile environment for more than eight years.

Rescuers discovered the five-person clan after a survey plane spotted a crude signal fire the family had created in a barbecue grill.

"Imagine my surprise when, smack-dab in the middle of nowhere, I saw these flames," pilot Terry Riggs said. "I did a second pass and was shocked to see actual human beings down there. I remember thinking to myself, 'My God, who could live in a place like that?' It's incredible to imagine they survived there for so long."

Bill Hobapple, 41, wife Meredith, 39, and son Jay disappeared in June 1993, when, two months after Jay's birth, the family of three left their Chicago apartment for parts unknown. The three were not heard from again until Monday, when they were found in the suburban outland known as Buffalo Grove with two new family members, Kimberly, 4, and Jordan, 2.

To protect themselves from the elements, the Hobapples fashioned a three-bedroom, ranch-style lean-to with brick facing and white aluminum siding. During their years on the acre-and-a-half lot, the Hobapples faced many hardships, including septo-tank backups, frequent air infiltration, and the threat of rezoning to erect an industrial park across the street.




Above: A photo of the Hobapples, taken during their years in the wilderness.

Conclusions

Issues with Form Based Codes

- Not complete codes
- Procedures
- LULU industrial uses
- Supplemental uses
- Non-NU development (e.g., Campus, Conventional Subdivision)
- Mapping
- Overlay issues (floodplains, environmental, airports)
- Vested rights / nonconformities
- Appeals
- Agencies



Concurrency

■ 30-60% reduction in trips for using Community Design options

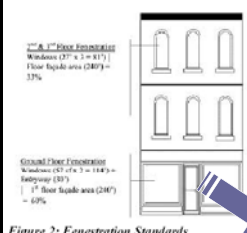



Figure 2: Fenestration Standards

Residential Equivalent Development Units	(B) % Non-Residential Equivalent Development Units	(C) % Trips Reduced
76-85%	15.24%	7.5%
66-75%	25.34%	15%
56-65%	35.44%	22.5%
46-55%	45.54%	30%
36-45%	55.64%	22.5%
26-35%	65.74%	15%
16-25%	75.84%	7.5%


Use Patterns

- Design templates for multiple-use development
- Optional
- Parts of UDC not applicable (e.g., buffers for commercial retrofit, tree preservation for conservation)
- Early in ordinance

Design templates that can be permitted by special use permit (or as of right) in designated zoning districts or areas



Tying it Together



St. Petersburg, FL



• Neighborhoods

• Corridors

• Clusters

• "St. Petersburg has diverse neighborhoods, each with its own unique character and identity."






Lessons Learned

- Plan basis
- Public participation
 - General planning policies
 - Build constituency
 - Neutralize opponents
- Establish by-right options
- Be realistic
- Compromise
- First step
- Code is a partial solution





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