Form Based Codes:
Practical & Legal Considerations

Institute on Planning, Zoning & Eminent Domain

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Introduction
With the rise of New Urbanism as a trend in urban planning, local governments are increasingly turning to their zoning and land development codes to encourage or require better development design. These design-oriented codes are often referred as “form based codes.” A “form based code” is a code that abandons the use-based orientation of a conventional zoning ordinance, and focuses instead on design characteristics. A better term might be a “design based code,” but for purposes of this paper I will use the term widely used by its proponents.

The Form-Based Codes Institute, a group of practitioners who are advancing the concept, defines a form-based code as:

"A method of regulating development to achieve a specific urban form. Form-based codes create a predictable public realm by controlling physical form primarily, with a lesser focus on land use, through city or county regulations."

The FBCI suggests that a form-based code have the following elements:

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<th>Element</th>
<th>Description</th>
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<tr>
<td><strong>Mandatory Elements:</strong></td>
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<tr>
<td>Regulating Plan</td>
<td>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 coded.</td>
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<tr>
<td>Building Form Standards</td>
<td>Regulations controlling the configuration, features, and functions of buildings that define and shape the public realm.</td>
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<td>Public Space/Street Standards</td>
<td>Specifications for the elements within the public realm (e.g., sidewalks, travel lanes, street trees, street furniture, etc.).</td>
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<td>Administration</td>
<td>A clearly defined application and project review process.</td>
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<td>Definitions</td>
<td>A glossary to ensure the precise use of technical terms.</td>
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<td><strong>Optional Elements:</strong></td>
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<tr>
<td>Architectural Standards</td>
<td>Regulations controlling external architectural materials and quality.</td>
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<tr>
<td>Landscaping Standards</td>
<td>Regulations controlling landscape design and plant materials on private property as they impact public spaces (e.g. regulations about parking lot screening and shading, maintaining sight lines, insuring unobstructed pedestrian movements, etc.).</td>
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<table>
<thead>
<tr>
<th>Signage Standards</th>
<th>Regulations controlling allowable signage sizes, materials, illumination, and placement.</th>
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<tr>
<td>Environmental Resource Standards</td>
<td>Regulations controlling issues such as storm water drainage and infiltration, development on slopes, tree protection, solar access, etc.</td>
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<td>Annotation</td>
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The FBCI lists six (6) jurisdictions that have adopted form-based codes: Petaluma, California; Azusa, California; Arlington, Virginia (Columbia Pike Special Revitalization District Form Based Code); Oakland, California (New Pleasant Hill BART Station Property Code); Woodford County, Kentucky; Sonoma, California; and Ventura, California.¹ Farmer’s Branch, Texas has also adopted a form-based code for transit-oriented development areas. Many more jurisdictions throughout the nation have adopted codes that would qualify as a form-based code under the FBCI’s definition.

Form-based codes are not a new phenomenon. Communities have long focused applied design based codes to specific areas, such as historic districts or neighborhoods. Others have used design review boards to dictate the physical form of new development. These codes typically focused on architectural style, and often exposed new development to very general language and discretionary review processes.

What separates form based codes from the older design based codes the application of broader set of design principles and the use of specific standards in lieu of case-specific review processes. While a form based code could apply to a variety of settings, they are typically used to achieve a compact physical form. The standards typically focus on achieving a relationship between buildings and streets and encourages walking, transit and a tighter neighborhood fabric rather than a specific architectural style.

A number of communities have adopted form based codes. Most apply them to specific situations, such as a downtown area or an urban corridor. For example, Arlington County, Virginia adopted one of the first so-called “form based codes” for the 3-mile Columbia Pike corridor. Older form based codes adopted standards for “traditional neighborhood developments” (TNDs) – or new communities with a mix of uses and a compact form that form a complete community. For example, San Antonio adopted a comprehensive set of “Use Patterns” in its 2002 Unified Development Code for TNDs, transit oriented development, commercial centers in existing neighborhoods, campus style development, and the retrofit of existing malls and other commercial areas. In the mid-1990s, several smaller communities in

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¹ See Form-Based Codes Institute (FBCI) website at [http://www.formbasedcodes.org/resource.html](http://www.formbasedcodes.org/resource.html).
North Carolina – including Huntersville, Davidson, Belmont, and Cornelus, completely replaced their zoning regulations with complete form based codes. Albuquerque, New Mexico adopted an optional form based code in 2008, and the City of St. Petersburg (Florida) replaced its single use zoning districts with neighborhood based mixed use districts in 2006. City of Miami replaced its land development regulations with a form based code on October 22, 2009, based on the “Smartcode” model developed by the architecture and urban design firm Duany Plater-Zyberk. Denver is also considering a form based code.

There are also several model form based codes that planners and municipal attorneys can use in their communities. Duany Plater-Zyberk’s “Smartcode”\(^3\) is a complete code based on the “transect” – a series of regional subareas that are based on the physical form of a typical metropolitan area. APA’s 21st Century Land Development Code – which I co-authored with Dr. Robert Freilich – offers a hybrid of conventional and form based zoning. This approach is suitable for a community that does not want to go “whole hog” for new urbanism, is interested in a more comprehensive code that goes beyond physical form, or that lacks the budget demanded by many form based code consultants for a complete overhaul. There are several recent publications targeted to planners and municipal attorneys interested in form based coding, such as American Planning Association’s Codifying the New Urbanism (American Planning Association, Planning Advisory Service Report No. 526, 2004), A Legal Guide to Urban and Sustainable Development for Planners, Developers and Architects (Wiley, 2008), and Form Based Codes: A Guide for Planners, Urban Designers, Municipalities, and Developers (Wiley, 2008).

This paper explains the elements of form based codes, discussed legal issues, and provides some examples of form based code language.

**What is a Code?**

Whether we are talking about a form based code or a more conventional zoning or subdivision ordinance, a code has the following characteristics:

- **Law.** Unlike a comprehensive plan or some other aspirational statement of land use policy, a code has the force of law. Once adopted, it is binding on new development. Also unlike most comprehensive plans, a code is subject to constitutional considerations governing property rights, due process (such as language precision), and related considerations. As such, it can expose a community to financial liability – sometimes significant – if it is not carefully drafted with these considerations in mind. This is particularly true in states like Texas, which does not require a written comprehensive plan and where a written plan is considered a guideline rather than a mandate. For example, a plan policy that requires developers to assume infrastructure costs in their neighborhood is not likely to become the target of litigation, because it is not binding and has no direct impacts on property rights. However, a code requirement that requires developers to improve existing road conditions could lead to litigation and, if the

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3 See Smartcode Central at [http://www.smartcodecentral.com/smartfiles9_2.html](http://www.smartcodecentral.com/smartfiles9_2.html).
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developer is successful, a significant adverse judgment against the local government. For example, a code provision by Flower Mound, Texas, that required developers to bring surrounding roads up to current standards was found to violate constitutional proportionality standards, with a resulting judgment of $425,426 in just compensation.  

- **Substantive rules.** A code creates substantive rules for development. It establishes the rules that say what uses are allowed, how much development is allowed (e.g., density or floor area ratio), where buildings are located (e.g., setbacks), how buildings are designed (e.g., building height, fenestration), how the site is improved (e.g., parking, landscaping), the type of infrastructure provided (e.g., street design, stormwater management), what environmental resources to protect (e.g., floodplain mitigation, riparian setbacks), and a host of other rules. These rules affect the impacts of development, how it looks, and how it fits into its context. By contrast, a plan level document typically has very general statements of policy that do not translate into a specific set of rules for development. In addition, form based code advocates frequently criticize conventional zoning because its basic setback and height rules do not lead to a specific physical form.

- **Procedural rules.** A code typically has rules that state how projects are entitled, who makes permitting decisions, what types of permits are required, and what happens if a property owner begins construction without the proper permits.

- **Mediation.** A plan level document often includes high level aspirational statements that reflect the goals of long range planning. However, translating these goals into specific development standards attracts the attention of a number of stakeholders – including neighborhood activists, developers, homebuilders, property owners, public works staff, and zoning administrators. These groups do not always agree about what standards should apply, and might not agree with the long range planning goals the led to the standards in the first place. In Texas and in most states, the code’s substantive and procedural rules do not become law until they are adopted by the legislative body (i.e., a city council or county commission), and typically after a recommendation by an appointed planning board. If these stakeholders do not agree with the standards, they can fill a public meeting room, take their case to the media or lobby their elected officials directly. As a result, a wise community typically begins the code development process with a careful public participation process the involves each of these stakeholders, and educates the broader community about why the standards are written the way they are. This often leads to changes in the standards and procedures along the way.

- **Dictionary.** A zoning ordinance includes a number of terms that are unfamiliar to many lay users. For administrative and legal purposes, these terms and concepts require careful explanation and definition. A modern form based code can be even more esoteric than a

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conventional zoning ordinance, introducing building design concepts and planning concepts such as the “transect” that are unfamiliar even to experienced zoning administrators. A code needs to explain these concepts so that they are understood by applicants, permitting officials, and surrounding neighborhoods. Because many of these concepts are fairly new, it is likely that a body of caselaw will emerge over the next century that interprets how they apply to specific situations. At present, there are few cases that interpret the meaning of many of the standards presently used in form based codes – such as build-to lines, fenestration, and similar concepts.

- **Bridge.** In most states, including Texas, a comprehensive plan is not self-enforcing. It is a statement of policies that are supposed to lead to regulatory action, but not enforceable on its own. It is up to the code drafter to translate these policies into specific standards that find their way into zoning and subdivision regulations. Unless that happens, applicants are free to ignore the community’s desires for design, building and site layout, and maximum development parameters. In some states, such as Florida, plan policies are directly enforceable – but this is not the case in most jurisdictions.

- **Enabler.** Even if a developer wants to conform to the vision articulated in a plan document, the zoning regulations may prevent this from happening. For example, a plan document may call for compact, mixed use, pedestrian friendly development with buildings aligned along the public sidewalk. However, a conventional commercial zoning district may establish large minimum front setbacks, require large amounts of off-site parking and land-consumptive stormwater management practices, and allow only a limited range of commercial uses. The community needs to lift these barriers if it wants to implement this policy.

**Code Ingredients**

What are the elements of a form based code? A code needs a variety of elements in order to make it a legally enforceable document. None of these are unique to a form based code, but their application can be quite different than a conventional zoning or subdivision ordinance.

- **Applicability – mandatory or optional?** The code needs to identify whether it is binding on all applicants, or is an option that property owners are free to choose or to ignore. Generally speaking, a mandatory code is more likely than an optional code to influence the built form of a community. In addition, it is more likely to invite political opposition and litigation, and usually requires more political will than an optional code. A community can couple an optional code with regulatory (such as permit streamlining) or financial (such as tax increment financing) incentives to encourage developers to use it. For example, San Antonio’s uses its tax increment financing program and other financial tools to encourage applicants to use the Use Patterns concepts in its UDC. There are also middle ground approaches for communities who are not ready or willing to mandate New Urbanism for applicants. For example, the City of Topeka’s draft Unified Development Code creates a point system for its traditional
neighborhood development patterns. This allows applicants to incorporate the fundamentals of good urban design in new developments, without rigid compliance all of the site and building design standards that a more aggressive community might apply.

- **Plan consistency.** Most good codes begin with a good plan. In states where a plan is not binding, it sets the policy direction for code updates, and can strengthen its legal enforceability. For example, the spot zoning cases attached to this paper demonstrate how solid planning policies supported small scale rezonings that were designed to create mixed use neighborhoods against spot zoning challenges.

- **Standards.** Most form based codes are designed to achieve a specific built form – typically a compact, pedestrian or transit friendly pattern. The standards tend to deemphasize use regulation, establish maximum (as opposed to minimum) setbacks, and may require minimum as opposed to maximum) densities or height. The standards may cap parking, require parking to be located to the rear of buildings, and establish narrower street sections with geometric standards that are easier for pedestrians to use. This often requires a different approach to regulation than conventional zoning (which is designed to control development impacts rather than to animate a street) and subdivision regulations (which may require infrastructure designed to absorb large traffic volumes). The approach creates more specific building envelope and massing standards than zoning, because it directly relates to the building’s context and its relation to the street and public infrastructure.

Many form based codes are based on a “regulating plan.” A regulating plan displays the situations where different types of form based code standards apply. Unlike a zoning map, which divides a jurisdiction into districts for the application of use and bulk standards, a regulating plan is usually based on streets and corridors. The plan typically shows where different building typologies are allowed, or where build-to lines or other building form standards apply.

A form based code uses many of the same concepts as conventional zoning and subdivision regulations. These include setbacks, building height, parking, and street design. The standards are different, but the concepts are largely the same. For example, conventional zoning regulation typically has minimum front setbacks, while a form based code has build-to lines (e.g., maximum setbacks). A conventional zoning ordinance has maximum building height measure in feet, while a form based code may have a minimum height measured in stories. A conventional code would have minimum parking ratios, while a form based code would have maximum ratios. Finally, the street cross-section standards in a conventional subdivision regulation are typically designed for convenient vehicle travel, with wide lanes and few pedestrian or multi-modal design features. A form based code would have narrower lanes, with pedestrian design features and street typologies based on the regulating plan or transect zone.
An important distinction between conventional zoning and form based codes is the regulation of use. Most form based codes focused on regulating building types rather than use. Districts and corridors include lists of permitted building types, rather than uses. However, most form based codes do not dispense completely with use regulations. Instead, they tend to include a more streamlined list of uses. Particularly if the form based code applies throughout a jurisdiction, the municipal attorney should examine the list of permitted uses to make sure that required uses are not omitted or regulated incorrectly — such as cell towers and adult uses.

Interestingly, most zoning enabling statutes appear sufficiently broad to contemplate zoning by building typology rather than use. For example, North Carolina’s zoning legislation provides: “A zoning ordinance may regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, structures and land.”5 Texas enables regulation of the height, number of stories, and size of buildings and other structures; lot coverage, size of yards, courts, and other open spaces; location of buildings and other structures; and (for home rule municipalities) building bulk.6

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5 N.C.G.S. § § 160A-381.
6 Texas Local Government Code § 211.003(a).
Example:

Most form based codes focus on building design regulations rather than use regulations. For examples, both of the following images are duplexes. After the duplexes in the image shown above were built, the jurisdiction eliminated duplexes as a permitted use in the zoning district. This blunt approach was an example of using use districts as a way to control undesirable design.

By contrast, the duplex below is part of a New Urbanist community in Tampa (West Park Village in Westchase). They have many desirable design features that make them compatible with the single-family detached homes next to them – such as a prominent front porch and entry, a walkway connecting the entry directly to the street, a modulated roof, and an alley. Some new urbanists object to the “pork chop” eaves, but most consumers would not notice this feature.
• **Procedures.** Most new urbanists prefer a code that maximizes upfront public involvement through the “charrette” process, with later approvals occurring administratively. Because a form based code typically has more precise standards than the design review board approach, the standards are usually suitable for “behind the counter” administration that does not require a public hearing. In addition, a public hearing can invite anti-density, “not in my backyard” (NIMBY) activism that pressures elected or planning officials to reduce the densities, intensities or height that is needed to achieve the urban form mandated by a plan.
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- **Codification.** Some form based code advocates believe that the concept is so different from conventional zoning that the codes should be codified as a separate, stand-alone document. As a result, many form based codes are codified separately from a jurisdiction’s zoning and subdivision regulations. Because the concepts are similar, many jurisdictions codify form based standards as part of their existing zoning or subdivision regulations, or as part of their existing unified development code. The APA’s 21st Century Land Development Code provides an example of this approach, as does the City of San Antonio’s Unified Development Code.

Codification can become an issue where a form based code uses different software and code entry protocols than the municipal codifier. Most form based codes have document design characteristics that are more advanced than a conventional legal code. These include integrated graphics, indentation, white space, and tables. Some designers write their codes in advanced desktop publishing programs such as Adobe Pagemaker or Indesign. While these programs improve page layout, they can create issues for codifiers who work with conventional word processing programs. Word processing programs can also incorporate tables and inline graphics as well, but the code drafter should work with the municipal codifier in advance to smooth out the transition from code drafting and codification. This can also provide preserve the graphic and document design benefits than can be lost in transitioning from a desktop publishing to a word processing format. For example, a Maryland county recently hired a consultant to develop a form based code. The consultant delivered the code in Indesign, but the municipal codifier only uses Microsoft Word. When the code was translated to Word in the codifier’s format, all of the page layout and indentation features of the code were lost. This could have been avoided by working in Microsoft Word from the outset, and developing a set of codification protocols with the county from the outset.

- **Nonconformities & vested rights.** A conventional zoning ordinance typically has rules that address uses and development situations that legally exist, but do not conform to the existing regulations. While a form based code is typically does not rigidly control uses, it can also create nonconforming situations. For example, if a code establishes a maximum front setback, what happens to buildings that are currently situated behind the setback? What about blank walls that do not conform to fenestration standards? Many form based codes are drafted by architects who are not dialed into the law of nonconformities, and courts have yet to apply nonconforming use principles to form based coding concepts. A good form based code should explain how this applies for nonconforming businesses or residents who continue operating – or who expand – after the code is adopted.

- **Appeals.** When decisions are made under a form based code, are they appealable, and to whom? How is the appeal heard, what are the standards for review, and what decisionmaking authority does the reviewing agency have? The board of adjustment procedure in conventional zoning regulations typically answers these questions. However, many form based codes either default to the existing appeals processes, or fail to address how this occurs.
Form-Based Code Models

There are several model form based codes that local governments can use as examples. It is important to note that the local government should never simply cut and paste a model code. A form based code requires calibration to local conditions in order to be effective. Calibration involves surveying local physical conditions, development typologies, enabling legislation, and the political and institutional climate to adapt standards to local needs.

The Congress for the New Urbanism conducted a Codes Project that culminated in the publication of a survey of form based codes in 2004. The publication summarizes form based codes that have been adopted throughout the nation.

Several states have model TND codes. In 1999, the Wisconsin State Legislature directed the University of Wisconsin to develop a model ordinance for a traditional neighborhood development and an ordinance for a conservation subdivision. Brian Ohm of the University of Wisconsin prepared the model code on April 2001, which was approved by the state legislature on July 28, 2001. The City of Madison is now going beyond the TND code and has developed a comprehensive, design based zoning code led by Cunningham Architects of Minneapolis. The Maryland Office of Planning publishes a model infill and redevelopment code, along with a survey of the state’s traditional neighborhood characteristics. Massachusetts publishes a model TND bylaw. The Oregon Department of Land Conservation and Development publishes model codes for mixed use development and infill.

The Smartcode™ developed by Duany Plater-Zyberk is a “complete” code based on the transect concept. It regulates building form, streets, and related matters. It covers both urban and rural situations. Modules are available for sustainability, affordable housing, complete streets, riparian and wetland buffers, stormwater management, redevelopment of sprawl (“sprawl repair”), incentives, lighting, architectural standards, and noise.

Steps to Code Reform

Developing a form based code involves several major steps:

- **Developing land use policies.** A comprehensive plan is ideally the first step toward code reform. It establishes the local government’s land use policies, and creates political and institutional momentum for code reform. In some states, codes must be consistent with the

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plan. In other states, the plan provides the basis for regulation, and can enhance their defensibility in the event of a court challenge.

- **Diagnosing existing codes.** The local government should examine its existing codes to identify where the code is inconsistent or fails to implement the plan policies.

- **Deciding what kind of code the community wants.** There are many ways to implement a comprehensive plan, including community design goals. A form based code is only one technique. Politically or institutionally, the community may prefer to “tweak” its zoning and subdivision regulations instead, use discretionary approvals, or targeted applications of a form based code.

- **Engaging the public.** A good public participation process can improve the quality of the code, build political support and credibility, and ensure its long term viability. A good public participation process can also improve the code’s legal defensibility, because judges are loathe to undermine a legislative effort that has broad community support and input.

- **Writing the code.** Some form based code consultants like to develop the code over a short time frame, such as a weekend charrette. Realistically, it takes time to write a code that is not only calibrated to local conditions, but also consistent with the local comprehensive plan policies and other parts of the municipal code. In addition, the public participation process will require frequent changes and rewriting. In addition, the more extensive and aggressive the code rewrite is, the longer it will take to develop language that is suitable to all stakeholders – or at least ready for adoption. As examples, Miami 21 took 4½ years from initiation to adoption. Denver began its process 4 years ago, and recently release the 3rd draft of its code for public discussion. San Antonio’s code – which was a hybrid – took 2 years from initiation to adoption.

- **Adopting the code.** The code only becomes reality when it is adopted by the legislative body. In most states, this requires a recommendation by the Planning Commission, and adoption by a city council or county board of commissioners. Ideally, the public participation process will vet the major issues before they are presented for adoption.

- **Training the code users.** Many concepts in a form based code will be new to the line staff and to applicants. It is a good idea to schedule training sessions to discuss how the code works, and to alert applicants to development opportunities.
Legal Requirements

As with any land use regulation, a form based code must be authorized by state law and consistent with the state and federal constitutions. To date, there are few cases that address the legality of so-called “form based codes,” although there are cases that address the components of a typical form based codes.14

Several states now expressly authorize form based zoning. At the plan level, California Government Code provides:

65302.4. Expressions of community intentions regarding urban form and design. The text and diagrams in the land use element that address the location and extent of land uses, and the zoning ordinances that implement these provisions, may also express community intentions regarding urban form and design. These expressions may differentiate neighborhoods, districts, and corridors, provide for a mixture of land uses and housing types within each, and provide specific measures for regulating relationships between buildings, and between buildings and outdoor public areas, including streets.

For designated communities, Virginia requires a comprehensive plan element that expressly incorporates new urbanist principles:

B. The comprehensive plan shall further incorporate principles of new urbanism and traditional neighborhood development, which may include but need not be limited to (i) pedestrian-friendly road design, (ii) interconnection of new local streets with existing local streets and roads, (iii) connectivity of road and pedestrian networks, (iv) preservation of natural areas, (v) satisfaction of requirements for stormwater management, (vi) mixed-use neighborhoods, including mixed housing types, (vii) reduction of front and side yard building setbacks, and (viii) reduction of subdivision street widths and turning radii at subdivision street intersections15.

The salient elements of a form based code appear to fall well within traditional grants of zoning authority. The Standard Zoning Enabling Act provides:

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

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15 Va. Code § 15.2-2223.1. This is limited to a community that (i) has a population of at least 20,000 and population growth of at least 5% or (ii) has population growth of 15% or more.
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....

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

As an example, Virginia provides that local governments may:

“... regulate, restrict, permit, prohibit, and determine the following:

1. The use of land, buildings, structures and other premises for agricultural, business, industrial, residential, flood plain and other specific uses;

2. The size, height, area, bulk, location, erection, construction, reconstruction, alteration, repair, maintenance, razing, or removal of structures;

3. The areas and dimensions of land, water, and air space to be occupied by buildings, structures and uses, and of courts, yards, and other open spaces to be left unoccupied by uses and structures, ...”

Several states are more explicit about physical design. Pennsylvania has adopted traditional neighborhood development enabling legislation (see attachment), while Wisconsin has mandated the adoption of local traditional neighborhood development ordinances for certain communities and promulgated a model code. Virginia expressly authorizes incentive zoning for traditional neighborhood development. Connecticut authorizes “village” districts with traditional design characteristics and Florida and New Hampshire authorize “innovative” land development regulations. The state transportation agencies in Virginia and North Carolina have adopted standards for traditional neighborhood street design. Florida’s concurrency standards – which tie development approval to infrastructure capacity standards – now establish “multimodal transportation districts” where capacity is based on multiple transportation modes and considers community design issues.

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16 Code of Virginia § 15.2-2280.
17 Title 53 P.S. § 10701-A et seq.
18 Wis. Stat. § 66.1027.
20 C.G.S.A. § 8-2j.
23 Florida Statutes § 163.3180(15); Steiner & Bond, Future Directions for Multimodal Areawide Level of Service Handbook Research and Development (Florida Department of Transportation, June 2004); Systems Planning
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The form based code must be constitutional on its face and its application. The principal considerations are property rights, due process, and equal protection. In concept, form based codes further a legitimate public purpose and should not affect property rights to an extent that rises to a taking. However, the regulations should be carefully drafted to make their purposes explicit, and to provide adequate notice to applicants about what is expected of them.

Other principles unique to zoning and land use law may also affect a form based code. These include caselaw on aesthetic based zoning, uniformity requirements, vagueness, and spot zoning:

- **Aesthetics.** A few states (e.g., Virginia) prohibit zoning that is designed principally to promote aesthetics. Even in states that allow aesthetic based zoning, a regulation that has a severe impact on the economic value of property is more defensible if is characterized as protecting public health rather than promoting visual appearance. In reality, the principles of New Urbanism underlying form based codes are not designed for further a taste preference. Instead, they are designed to promote walkable communities, minimum energy consumption and the degradation of environmental resources through more compact development, encourage transit use, and to minimize urban sprawl. There is now a vast body of literature that documents the public health benefits of compact development. However, by focusing on physical design and what a development “looks like,” some form based code proponents might inadvertently create the impression that a new urbanism is about appearance. Particularly in states where the courts take a hard look at enabling legislation and property rights, it is important that the code include findings that document what it is really about – long term community health, property values, and neighborhood stability.

- **Vagueness.** Design based codes sometimes include very general statements about appearance, compatibility, and design. If these statements require a subjective interpretation by the permitting authority, a court could overturn the regulations as excessively vague. Under this principle, the regulations must give property owners must have a reasonable sense of what is expected of them, or the courts will not enforce the standards. Some states are stricter about this requirement than others. In addition, if the regulations affect First Amendment (free speech) rights – such as signs or adult uses – the federal constitutional requires considerably more language precision than a garden variety land use control. In practice, form based codes are a vast improvement over traditional design review boards because they tend to include very precise building envelope and architectural standards. In

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Office, Florida Department of Transportation, Multimodal Transportation Districts and Areawide Quality of Service Handbook (Nov. 2003).

fact, the standards may be more precise than the generalized health, safety and compatibility findings required for conditional use permits or other discretionary zoning controls. However, more precision is typically better than less, and the drafter is well advised to become acquainted with their state’s caselaw on regulatory precision.

- **Spot zoning.** One benefit of form based codes is their ability to replace vast, single use neighborhoods with a denser fabric of mixed uses. However, zoning actions that weave new uses into a single use neighborhood are sometimes challenged as spot zoning. In practice, mixing districts is defensible when it is based on sound planning principles that are articulated in advance, and that advanced by the specific zoning action. However, some court opinions, read in isolation, seem to intimate that zoning actions that introduce uses that vary too widely from their neighbors are susceptible to invalidation as spot zoning. In Texas, the courts characterize spot zoning the rezoning of a small tract is rezoned to permit uses not allowed on similar surrounding lands without proof of changes in conditions. The courts have characterized this practice as “the antithesis of planned zoning” and have stated that the practice is “widely condemned.”

Spot zoning principles, when read as a whole, should not mandate urban sprawl. Spot zoning cases indicate that courts will uphold small scale rezonings that further comprehensive planning policies that promote new urbanism. The City of San Antonio recognizes these principles in its rezoning procedures, noting that small scale commercial rezonings in existing residential neighborhoods further its planning policies that support mixed use development. This practice is supported by the cases summarized below.

**Case Summaries**

The following summarizes some cases that have addressed aspects of form based coding:

1. **Restigouche v. Town of Jupiter (11th Cir. 1995)**

   In upholding the denial of a special exception for a car sales campus in a traditional corridor, the 11th Circuit Court of Appeals reasoned:

   “The first step in determining whether legislation survives rational-basis scrutiny is identifying a legitimate government purpose—a goal—which the enacting government body could have been pursuing.”  [citation omitted]  The Town asserts that the Comprehensive Plan and IOZ Regulations reflect its concern with preserving and establishing an aesthetically-pleasing corridor along Indiantown Road, and its goal of

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26 *Pharr, supra; Hunt v. City of San Antonio*, 462 S.W.2d 536, 539 (Tex. 1971).
creating an identifiable, traditional downtown. It is well settled that the maintenance of community aesthetics is a legitimate government purpose.\(^{27}\)

The court noted that encouraging retail uses and prohibiting car dealerships furthers this public purpose because:

- auto purchases are not an everyday need
- large auto lot breaks up pedestrian flows
- dealerships disrupt the planned residential character of the area

2. **Marshall v. Salt Lake City (Utah 1943)**

The legitimacy of encouraging walkable communities is not new to American jurisprudence. For example, walkability was a central theme Salt Lake City’s original zoning districts adopted in 1927. The zoning scheme established 7 districts, including 3 residential and 2 commercial districts. One of the commercial districts was entitled "Residential 'C'. This district not only permitted residential uses, but also retail shops, fire and police stations, banks, theatres, lunch rooms, drug stores, shoe repair shops, barber shops, garages and service stations. The zoning ordinance designated as Residential “C” land that was currently being used for business uses and small areas on each corner of the intersections of the City’s main thoroughfares in the district. The plaintiff challenged the allowance of non-residential uses on corner lots abutting his dwelling units. Rejecting the notion that this constituted spot zoning, the Utah Supreme Court reasoned:

"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 free 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. To effectuate this objective, there were created, on a definite, unified plan, at the intersections of definite fixed through streets, these small residential utility districts, limited and confined to such uses. Being set up on such a definite and comprehensive plan it cannot be said to be arbitrary or discriminatory.\(^{28}\)


The County adopted a Generalized Land Plan that divided it into seven planning districts. Additionally, the General Development Policies District Plan (GDP) describing community issues,

\(^{27}\) *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1214 (11th Cir. 1995), citing *Haves v. City of Miami*, 52 F.3d 918, 922-23 (11th Cir.1995) and *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1387 (11th Cir.1993), cert. denied, 511 U.S. 1018, 114 S.Ct. 1400, 128 L.Ed.2d 73 (1994).

goals, objectives, policies and strategies of the seven districts was jointly adopted with the City. The GDP provides for several types of Mixed-Use and Commercial Centers to be placed throughout the County so as to organize and give structure to the overall land use pattern of the County.

The smallest type of center described in the GDP is the **Neighborhood Convenience Center**, the purpose of which is the sale of convenience goods to meet the daily needs of the immediate residential neighborhood, including food, drugs, sundries, laundry, cleaners, barbers and shoe repair shops. These Centers would contain a maximum of 70,000 square feet of retail space. The seven individual district plans identify over 70 locations where the Centers either exist or were appropriate for future development.

The GDP also describes a larger **Neighborhood Mixed-Use Center**. This type of Center contains up to 250,000 square feet of non-residential development which includes services such as a super-market, small shops, restaurants, low-rise medical centers and banks. The GDP acknowledges that “planning is a dynamic process that necessitates being flexible and adapting to changes,” and it establishes four separate processes for initiating formal amendments to a district plan. One method allows a petitioner seeking rezoning that conflicts with a district plan to obtain an amendment to the plan as part of the general rezoning process. If the rezoning petition is approved by the Board, the relevant district plan is amended simultaneously with the zoning decision.

An applicant petitioned to rezone a 14.9 acre portion of his property at and intersection from the existing R-3 to B-1 (CD) Parallel Conditional Use District to allow for a Neighborhood Convenience Center. The petition was approved, and challenged by the applicant’s neighbors as spot zoning. Rejecting this challenge, the court compared the benefits and detriments to the applicant, his neighbors and the surrounding neighborhood. The court found that:

> “the philosophy behind the Neighborhood Convenience Center, as set out in the GDP, and its placement within residential areas, was to allow those who live nearby to walk or travel very short distances for goods to meet their daily needs. Thus, the trial court concluded development of the Neighborhood Convenience Center would benefit the surrounding community in that it would provide daily goods and services while eliminating lengthy trips thereby lessening the burden on other streets and roads.”


The court invalidated an ordinance that provided: “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,” as applied to garden apartments. The court held that the ordinance (1) had no reasonable relationship to zoning purposes (N.J. anti-aesthetic rule); (2) was vague:

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“The only possible purpose for the restriction would be for aesthetic considerations, to conserve the value of property and encourage its most appropriate use.... While the restriction may bear a reasonable relationship to such a purpose as applied to single-family residences in a single-family residential district, it bears no such relationship as applied to garden apartment complexes in which apartment buildings and parking facilities are frequently arranged at various angles and positions in relation to the property’s ‘frontage’ on a public street.

Plaintiff argues that the Article when applied to garden apartment complexes is vague, uncertain and indefinite. ‘Front yard’ parking for four or more cars is prohibited in single-family residential zones. The definition of ‘front yard’ set forth in the ordinance is vague and uncertain as applied to plaintiff's proposed use where there are internal private roadways. The definition of ‘front yard’ in the ordinance does not readily apply to the present situation, and the determination of what is a ‘front yard’ is therefore left largely up to the Board.30

This precedent is of concern because form based codes typically control the location of parking, assigning to the rear lot or midblock locations. A form based code may also limit the supply of parking, especially where transit is available. In response to J.D. Construction, New Jersey is among the minority of states that does not support aesthetic zoning. However, aesthetics is not the most important justification for parking design and supply regulations. The location of parking affects walkability, and the more carefully calibrated design regulations found in most form based codes solves the design gap noted in J.D. Construction. Local governments have no constitutional obligation to zone sufficient space for off-street parking.31 Other restrictions, such as parking lot landscaping requirements, have been upheld against takings challenges.32

5. Dallen v. KC (Mo.App. 1992)

Arising out of a Special Main Street Corridor Review District, Dallen is one of the only cases in the nation that has addressed the validity of a build-to line.33 The City adopted enabling ordinances providing for the establishment and termination of Special Review Districts. The enabling ordinances prohibited the Special Review Districts from modifying the land use regulations for the underlying district. Pursuant to the enabling ordinance, the City established the Main Street Corridor Special Review District (MSSRD) as a special review district along Main Street. The MSSRD standards provided, among other things, that:

31 State v. Rush, 324 A.2d 748 (Me. 1974).
33 822 S.W.2d 429 (Mo.App. 1991).
A. Any new structure shall be built with the facade covering at least 70% of the primary street frontage of any site with 100 feet or more of frontage, provided, however, that in the case of a corner lot with two primary street frontages, the 70% minimum shall apply only to the primary street of greater distance and the primary street frontage of lesser distance shall require only 25% coverage.

B. Building shall be set back no more than 10 feet from the street line, with the exception of buildings of 100 feet or more in height, which shall be set back from the street line no more than 10% of the height of the building; provided, however, this requirement shall not apply to any building used exclusively for residential use.

....

C. Parking

1. No off-street parking, loading, or service areas shall be provided between any building and the primary street line.

The plaintiffs owned a Phillips 66 gasoline station and car wash located within the MSSRD. They proposed to rebuild the station in a manner consistent with the underlying zoning (C-3a2) but in conflict with the provisions of the MSSRD. The court found that requiring new station to be constructed within the ten feet set back was an impermissible modification and was "so burdensome as to these plaintiffs as to be confiscatory." The regulations constituted a modification because the underlying zoning (C-3a2) allows an unrestricted use of that property, while the MSSRD imposes additional requirements restricting the manner in which the property can be used. The mandatory ten foot setback, building material regulations, parking regulations, signage, signs, building entrances and windows regulations were summarily found to be confiscatory and unconstitutional. The court further rejected the City's argument that the ordinance was not confiscatory because it permits "thirty-plus uses." The court reasoned that this "completely ignores the practicalities of operating a gas station," because "[b]y no stretch of the imagination can a gas station built within the ten foot allowance."

The Dallen decision conflicts with the majority rule in most states to provide judicial deference to local land development standards. In addition, gas stations have been construction constructed since Dallen was decided with rear parking and fuel pump stations, dispelling the court's conclusion about the feasibility of this standard. Courts in many states would consider the reasoning in Dallen to constitute an unwarranted intrusion by the court on legislative judgment. However, the decision does signal some caution in drafting and applying these types of standards.
First, if the standards are mandatory, the local government may consider exempting uses that cannot conform to them—or not allowing those uses at all in the underlying district. Second, the regulations should be internally consistent, providing a clear message throughout the ordinance as to what is permitted in what is not permitted. Finally, a good set of legislative findings should accompany the regulations that demonstrate why they are needed and ruling on their economic viability and marketability. In most states, courts must defer to legislative findings. While this adds to the length of the ordinance, it can assist in its legal defense in the event of a challenge.


Many form based codes establish minimum height or density standards, or minimum building height requirements at the street level for storefronts. These standards provide street enclosure, and also ensure that storefronts remain viable for a variety of uses. However, minimum height standards have not fared well in cases where they have been challenged. These are all older cases that did not consider minimum heights in view of modern planning standards, documentation of the broader relationship between design and community health, and a more expansive view of the police power.

The City of North Miami in this case had a requirement that “[a]ll main buildings or structures must have a minimum floor area of two thousand, five hundred (2,500) square feet” and that “[a]ll facades or false fronts of or to buildings shall be at least fifteen (15) feet in height.” The requirements were not tied to lot size. The court brushed off the standard with a conclusory holding:

Zoning requirements specifying minimum height for business buildings have uniformly been held invalid, as arbitrary, unreasonable and having no relation to public health, safety, or welfare. See 122 Main Street Corporation v. City of Brockton, 323 Mass. 646,
84 N.E.2d 13; 58 Ma.Jur., Zoning s 49; Annot. 8 A.L.R.2d 963, 978-980; 1 Metzenbaum, Law of Zoning, Ch. 7-e, p. 277; 1 Yokley, Zoning Law and Practice, s 17-6.\(^\text{34}\)

A community that wants to include minimum height standards in a form based code should include careful findings that document why the standards are needed. Graphics that illustrate the differences between undersized and properly sized buildings in relation to the street can help the reader and, if needed, a reviewing court, understand why they are needed. Updated state planning legislation, such as Florida’s “innovative land use controls” (F.S. § 163.3202), can provide further support for these types of controls. (Note: this statute was not in effect when the North Miami case was decided).


While Anderson v. Issaquah struck down design controls because they were excessively vague,\(^\text{35}\) the case illustrates why form based codes are a better alternative to address physical design issues than the older design review board model. In this case, the design review board applied the following standards to a modernist building:

“Relationship of Building and Site to Adjoining Area.

1. Buildings and structures shall be made compatible with adjacent buildings of conflicting architectural styles by such means as screens and site breaks, or other suitable methods and materials.

2. Harmony in texture, lines, and masses shall be encouraged.

. . . . .

IMC 16.16.060(D). Building Design.

1. Evaluation of a project shall be based on quality of its design and relationship to the natural setting of the valley and surrounding mountains.

2. Building components, such as windows, doors, eaves and parapets, shall have appropriate proportions and relationship to each other, expressing themselves as a part of the overall design.


3. Colors shall be harmonious, with bright or brilliant colors used only for minimal accent.

4. Design attention shall be given to screening from public view all mechanical equipment, including refuse enclosures, electrical transformer pads and vaults, communication equipment, and other utility hardware on roofs, grounds or buildings.

5. Exterior lighting shall be part of the architectural concept. Fixtures, standards and all exposed accessories shall be harmonious with the building design.

6. Monotony of design in single or multiple building projects shall be avoided. Efforts should be made to create an interesting project by use of complimentary details, functional orientation of buildings, parking and access provisions and relating the development to the site. In multiple building projects, variable siting of individual buildings, heights of buildings, or other methods shall be used to prevent a monotonous design.

The court invalidated the language, applying the following common rationale in these cases:

“[A] statute which either forbids or requires the doing of an act in terms so vague that men [and women] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

...In the field of regulatory statutes governing business activities, statutes which employ technical words which are commonly understood within an industry, or which employ words with a well-settled common law meaning generally will be sustained against a charge of vagueness. ... The vagueness test does not require a statute to meet impossible standards of specificity....

In the area of land use, a court looks not only at the face of the ordinance but also at its application to the person who has sought to comply with the ordinance and/or who is alleged to have failed to comply. .... The purpose of the void for vagueness doctrine is to limit arbitrary and discretionary enforcements of the law....

Interestingly, the court noted that integrated graphics could have solved the problems created by the code’s imprecise language and overbroad delegation of authority:

As well illustrated by the appendices to the brief of amici curiae, aesthetic considerations are not impossible to define in a code or ordinance.... Appendix A to the brief of amici curiae is a portion of the design objectives plan for entry way corridors for Bozeman, Montana. Appendix B is a portion of the development code for San Bernardino, California. Both codes contain extensive written criteria illustrated by schematic drawings and photographs. The illustrations clarify a number of concepts which otherwise might be difficult to describe with the requisite degree of clarity.
The integrated code described by the court and presented by the amici curiae is typical of a form based code. In addition, unlike a typical design review board code, a form based code does not usually regulate architectural style. Instead, the code establishes building envelope standards that can absorb virtually architectural style, including traditional and modern elements.

**Conclusions**

Form based codes are a useful tool for communities who struggle with inadequate, sprawling design, the rigidities of conventional zoning, and the need to implement modern planning concepts. It is not usually a complete solution for a community’s land development needs. Form based codes do not adequately address the impacts of development, and can ignore the regulation of uses that are of concern to neighborhoods or that demand a more comprehensive approach for legal reasons. However, it is a much more effective, and legally defensible, way to regulation physical design than traditional discretionary review.

Like conventional zoning, form based codes can take many forms. Simple standards can be added to commercial zoning districts for communities who need rapid deployment of design standards or who cannot afford the expensive budgets that many form based codes carry. At the same time, a more comprehensive approach can dramatically improve the physical form of a community, with resulting improvements in sustainability and economic development potential. While form based codes have not been litigated in their entirety, they promise to create new directions in land use law, and may result in wider recognition by the courts of the advantages of design controls.
Pennsylvania Traditional Neighborhood Development Statute

Title 53 P.S. Municipal and Quasi-Municipal Corporations

Part I. General Municipal Law

Chapter 30. Planning and Development

Article I. General Provisions

§ 10107. Definitions

"Traditional neighborhood development," an area of land developed for a compatible mixture of residential units for various income levels and nonresidential commercial and workplace uses, including some structures that provide for a mix of uses within the same building. Residences, shops, offices, workplaces, public buildings and parks are interwoven within the neighborhood so that all are within relatively close proximity to each other. Traditional neighborhood development is relatively compact, limited in size and oriented toward pedestrian activity. It has an identifiable center and a discernible edge. The center of the neighborhood is in the form of a public park, commons, plaza, square or prominent intersection of two or more major streets. Generally, there is a hierarchy of streets laid out in a rectilinear or grid pattern of interconnecting streets and blocks that provides multiple routes from origins to destinations and are appropriately designed to serve the needs of pedestrians and vehicles equally.

Title 53 P.S. Municipal and Quasi-Municipal Corporations

Part I. General Municipal Law

Chapter 30. Planning and Development

Article VII-A. Traditional Neighborhood Development

§ 10701-A. Purposes and objectives

(a) This article grants powers to municipalities for the following purposes:

(1) to insure that the provisions of Article VI which are concerned in part with the uniform treatment of dwelling type, bulk, density, intensity and open space within each zoning district
shall not be applied to the improvement of land by other than lot by lot development in a manner that would distort the objectives of Article VI;

(2) to encourage innovations in residential and nonresidential development and renewal which makes use of a mixed-use form of development so that the growing demand for housing and other development may be met by greater variety in type, design and layout of dwellings and other buildings and structures and by the conservation and more efficient use of open space ancillary to said dwellings and uses;

(3) to extend greater opportunities for better housing, recreation and access to goods, services and employment opportunities to all citizens and residents of this Commonwealth;

(4) to encourage a more efficient use of land and of public services to reflect changes in the technology of land development so that economies secured may benefit those who need homes and for other uses;

(5) to allow for the development of fully integrated, mixed-use pedestrian-oriented neighborhoods;

(6) to minimize traffic congestion, infrastructure costs and environmental degradation;

(7) to promote the implementation of the objectives of the municipal or multimunicipal comprehensive plan for guiding the location for growth;

(8) to provide a procedure in aid of these purposes which can relate the type, design and layout of residential and nonresidential development to the particular site and the particular demand for housing existing at the time of development in a manner consistent with the preservation of the property values within existing residential and nonresidential areas; and

(9) to insure that the increased flexibility of regulations over land development authorized herein is carried out under such administrative standards and procedure as shall encourage the disposition of proposals for land development without undue delay.

(b) The objectives of a traditional neighborhood development are:

(1) to establish a community which is pedestrian-oriented with a number of parks, a centrally located public commons, square, plaza, park or prominent intersection of two or more major streets, commercial enterprises and civic and other public buildings and facilities for social activity, recreation and community functions;

(2) to minimize traffic congestion and reduce the need for extensive road construction by reducing the number and length of automobile trips required to access everyday needs;

(3) to make public transit a viable alternative to the automobile by organizing appropriate building densities;
(4) to provide the elderly and the young with independence of movement by locating most daily activities within walking distance;

(5) to foster the ability of citizens to come to know each other and to watch over their mutual security by providing public spaces such as streets, parks and squares and mixed use which maximizes the proximity to neighbors at almost all times of the day;

(6) to foster a sense of place and community by providing a setting that encourages the natural intermingling of everyday uses and activities within a recognizable neighborhood;

(7) to integrate age and income groups and foster the bonds of an authentic community by providing a range of housing types, shops and workplaces; and

(8) to encourage community-oriented initiatives and to support the balanced development of society by providing suitable civic and public buildings and facilities.

§ 10702-A. Grant of power

The governing body of each municipality may enact, amend and repeal provisions of a zoning ordinance in order to fix standards and conditions for traditional neighborhood development. The provisions for standards and conditions for traditional neighborhood development shall be included within the zoning ordinance, and the enactment of the traditional neighborhood development provisions shall be in accordance with the procedures required for the enactment of an amendment of a zoning ordinance as provided in Article VI. The provisions shall:

(1) Set forth the standards, conditions and regulations for a traditional neighborhood development consistent with this article.

   (i) In the case of new development, a traditional neighborhood development designation shall be in the form of an overlay zone. Such an overlay zone does not need to be considered a conditional use by the municipality if it chooses not to.

   (ii) In the case of either an outgrowth or extension of existing development or urban infill, a traditional neighborhood development designation may be either in the form of an overlay zone or as an outright designation, whichever the municipality decides. Outgrowths or extensions of existing development may include development of a contiguous municipality .

(2) Set forth the procedures pertaining to the application for, hearing on and preliminary and final approval of a traditional neighborhood development which shall be consistent with this article for those applications and hearings.

§ 10703-A. Transferable development rights
Form Based Codes:
Practical & Legal Considerations

Municipalities electing to enact traditional neighborhood development provisions may also incorporate provisions for transferable development rights on a voluntary basis in accordance with express standards and criteria set forth in the ordinance and with the requirements of Article VI.

§ 10704-A. Applicability of comprehensive plan and statement of community development objectives

All provisions and all amendments to the provisions adopted pursuant to this article shall be based on and interpreted in relation to the statement of community development objectives of the zoning ordinance and shall be consistent with either the comprehensive plan of the municipality or the statement of community development objectives in accordance with section 606. Every application for the approval of a traditional neighborhood development shall be based on and interpreted in relation to the statement of community development objectives and shall be consistent with the comprehensive plan.

§ 10705-A. Forms of traditional neighborhood development

A traditional neighborhood development may be developed and applied in any of the following forms.

(1) As a new development.

(2) As an outgrowth or extension of existing development.

(3) As a form of urban infill where existing uses and structures may be incorporated into the development.

(4) In any combination or variation of the above.

§ 10706-A. Standards and conditions for traditional neighborhood development

(a) All provisions adopted pursuant to this article shall set forth all the standards, conditions and regulations by which a proposed traditional neighborhood development shall be evaluated, and those standards, conditions and regulations shall be consistent with the following subsections.

(b) The provisions adopted pursuant to this article shall set forth the uses permitted in traditional neighborhood development, which uses may include, but shall not be limited to:

(1) Dwelling units of any dwelling type or configuration or any combination thereof.

(2) Those nonresidential uses deemed to be appropriate for incorporation in the design of the traditional neighborhood development.
Form Based Codes:
Practical & Legal Considerations

(c) The provisions may establish regulations setting forth the timing of development among the various types of dwellings and may specify whether some or all nonresidential uses are to be built before, after or at the same time as the residential uses.

(d) The provisions adopted pursuant to this article shall establish standards governing the density or intensity of land use in a traditional neighborhood development. The standards may vary the density or intensity of land use otherwise applicable to the land under the provisions of a zoning ordinance of the municipality within the traditional neighborhood development. It is recommended that the provisions adopted by the municipality pursuant to this article include, but not be limited to, all of the following:

1. The amount, location and proposed use of common open space, providing for parks to be distributed throughout the neighborhood as well as the establishment of a centrally located public commons, square, park, plaza or prominent intersection of two or more major streets.

2. The location and physical characteristics of the site of the proposed traditional neighborhood development, providing for the retaining and enhancing, where practicable, of natural features such as wetlands, ponds, lakes, waterways, trees of high quality, significant tree stands and other significant natural features. These significant natural features should be at least partially fronted by public tracts whenever possible.

3. The location and physical characteristics of the site of the proposed traditional neighborhood development so that it will develop out of the location of squares, parks and other neighborhood centers and subcenters. Zoning changes in building type should generally occur at mid-block rather than mid-street, and buildings should tend to be zoned by compatibility of building type rather than building use. The proposed traditional neighborhood development should be designed to work with the topography of the site to minimize the amount of grading necessary to achieve a street network, and some significant high points of the site should be set aside for public tracts for the location of public buildings or other public facilities.

4. The location, design, type and use of structures proposed, with most structures being placed close to the street at generally the equivalent of one-quarter the width of the lot or less. The distance between the sidewalk and residential dwellings should, as a general rule, be occupied by a semipublic attachment such as a porch or, at a minimum, a covered entryway.

5. The location, design, type and use of streets, alleys, sidewalks and other public rights-of-way with a hierarchy of streets laid out in a rectilinear or grid pattern of interconnecting streets and blocks that provide multiple routes from origins to destinations and are appropriately designed to serve the needs of pedestrians and vehicles equally. As such, most streets, except alleys, should have sidewalks.

6. The location for vehicular parking with the street plan providing for on-street parking for most streets, with the exception of alleys. All parking lots, except where there is a compelling reason to the contrary, should be located either behind or to the side of buildings and in most cases should be located toward the center of blocks such that only their access is visible from
adjacent streets. In most cases, structures located on lots smaller than 50 feet in width should be served by a rear alley with all garages facing on alleys. Garages not served by an alley should be set back a minimum of 20 feet from the front of the house or rotated so that the garage doors do not face any adjacent streets.

(7) The minimum and maximum areas and dimensions of the properties and common open space within the proposed traditional neighborhood development and the approximate distance from the center to the edge of the traditional neighborhood development. It is recommended that the distance from the center to the edge of the traditional neighborhood development be approximately one-quarter mile or less and not more than one-half mile. Traditional neighborhood developments in excess of one-half mile distance from center to edge should be divided into two or more developments.

(8) The site plan to provide for either a natural or man-made corridor to serve as the edge of the neighborhood. When standing alone, the traditional neighborhood development should front on open space to serve as its edge. Such open space may include, but is not limited to, parks, a golf course, cemetery, farmland or natural settings such as woodlands or waterways. When adjacent to existing development, the traditional neighborhood development should either front on open space, a street or roadway or any combination hereof.

(9) The greatest density of housing and the preponderance of office and commercial uses should be located in the center of the traditional neighborhood development. However, if the neighborhood is adjacent to existing development or a major roadway then office, commercial and denser residential uses may be located at either the edge or the center, or both. Commercial uses located at the edge of the traditional neighborhood development may be located adjacent to similar commercial uses in order to form a greater commercial corridor.

(e) In the case of a traditional neighborhood development proposed to be developed over a period of years, standards established in provisions adopted pursuant to this article may, to encourage the flexibility of housing density, design and type intended by this article:

(1) Permit a variation in each section to be developed from the density or intensity of use established for the entire traditional neighborhood development.

(2) Allow for a greater concentration of density or intensity of land use within some section or sections of development, whether it be earlier or later in the development than upon others.

(3) Require that the approval of such greater concentration of density or intensity of land use for any section to be developed be offset by a smaller concentration in any completed prior stage or by an appropriate reservation of common open space on the remaining land by a grant of easement or by covenant in favor of the municipality, provided that the reservation shall as far as practicable defer the precise location of such common open space until an application for final approval is filed so that flexibility of development which is a prime objective of this article can be maintained.
(f) Provisions adopted pursuant to this article may require that a traditional neighborhood development contain a minimum number of dwelling units and a minimum number of nonresidential units.

(g)

(1) The authority granted a municipality by Article V to establish standards for the location, width, course and surfacing of streets, walkways, curbs, gutters, street lights, shade trees, water, sewage and drainage facilities, easements or rights-of-way for drainage and utilities, reservations of public grounds, other improvements, regulations for the height and setback as they relate to renewable energy systems and energy-conserving building design, regulations for the height and location of vegetation with respect to boundary lines, as they relate to renewable energy systems and energy-conserving building design, regulations for the type and location of renewable energy systems or their components and regulations for the design and construction of structures to encourage the use of renewable energy systems, shall be vested in the governing body or the planning agency for the purposes of this article.

(2) The standards applicable to a particular traditional neighborhood development may be different than or modifications of the standards and requirements otherwise required of subdivisions or land development authorized under an ordinance adopted pursuant to Article V, provided, however, that provisions adopted pursuant to this article shall set forth the limits and extent of any modifications or changes in such standards and requirements in order that a landowner shall know the limits and extent of permissible modifications from the standards otherwise applicable to subdivisions or land development.

§ 10707-A. Sketch Plan Presentation

The municipality may informally meet with a landowner to informally discuss the conceptual aspects of the landowner’s development plan prior to the filing of the application for preliminary approval for the development plan. The landowner may present a sketch plan to the municipality for discussion purposes only, and during the discussion the municipality may make suggestions and recommendations on the design of the developmental plan which shall not be binding on the municipality.

§ 10708-A. Manual of written and graphic design guidelines

Where it has adopted provisions for a traditional neighborhood development, the governing body of a municipality may also adopt by ordinance, upon review and recommendation of the planning commission where one exists, a manual of written and graphic design guidelines to assist applicants in the preparation of proposals for a traditional neighborhood development.
§ 10709-A. Applicability of article to agriculture

Zoning ordinances shall encourage the continuity, development and viability of agricultural operations. Zoning ordinances may not restrict agricultural operations or changes to or expansions of agricultural operations in geographic areas where agriculture has traditionally been present unless the agricultural operation will have a direct adverse effect on the public health and safety. Nothing in this section shall require a municipality to adopt a zoning ordinance that violates or exceeds the provisions of the act of June 30, 1981 (P.L. 128, No. 43), known as the "Agricultural Area Security Law," the act of June 10, 1982 (P.L. 454, No. 133), entitled "An act protecting agricultural operations from nuisance suits and ordinances under certain circumstances," and the act of May 20, 1993 (P.L. 12, No. 6), known as the "Nutrient Management Act."
Form Based Codes:
Practical & Legal Considerations

Dallen v. Kansas City (1991)

Dallen v. City of Kansas City, 822 S.W.2d 429 (Mo.App., 1991)

BERREY, Presiding Judge.

Appellant, the City of Kansas City, challenges a judgment of the circuit court in an action for declaratory judgment and permanent injunction questioning the validity of certain zoning ordinances. Affirmed.

Appellant alleges four points of error: (1) that the trial court erred in declaring the Main Street Special Review District void because the trial court shifted the burden of proof as there is a presumption of validity which attaches to any legislative act; (2) that the trial court erred in declaring the ten foot maximum setback to be so burdensome as to be confiscatory; (3) that the trial court erred in striking the Special Review District as a whole and in failing to limit its order to the offending regulation because the remainder may stand independent of the ten foot maximum setback; and (4) that the trial court erred in denying appellant's motion for a new trial.

Respondents, Jay and Mary Kay Dallen, filed an action for declaratory judgment and permanent injunction. They challenged the validity of Sections 39.810 and 39.811 of the Kansas City, Missouri zoning ordinances. These two ordinances are enabling ordinances providing for the establishment and termination of Special Review Districts.

Pursuant to the enabling ordinance, a special review district was established along Main Street from 29th Street to 47th Street by the Fourth Committee substitute for Ordinance 59380. Respondents also challenge that ordinance creating the Main Street Corridor Special Review District (MSSRD). Ordinance 59380 provides, in pertinent part:

WHEREAS, Section 39.810 provides for the establishment of a Special Review District subject to certain conditions; and

WHEREAS, it has been determined that a Special Review District is desirable for the area along Main Street from 27th Street to 47th Street; and

WHEREAS, the designation of said District is necessary for the purposes set forth in Section 39.810; and

WHEREAS, the creation of the District is necessary for the purposes set forth in Section 39.810; and

WHEREAS, the size of the District is limited to the size necessary to effectuate the purposes of Section 39.810; NOW, THEREFORE,

BE IT ORDAINED BY THE COUNCIL OF KANSAS CITY
Form Based Codes: Practical & Legal Considerations

Section A. That Chapter 65, Revised Ordinances of Kansas City, is hereby amended by adding a new section to be known as Section 65.010A1958 rezoning an area generally bounded by 27th Street, Baltimore Avenue, Walnut Street and 47th Street to overlay District SR, Main Street Corridor Special Review District....

Section B. That the Special Review Plan providing for the standards of the Main Street Corridor Special Review District is approved as follows:

*432 Standards and regulations

I. Building Considerations

A. Any new structure shall be built with the facade covering at least 70% of the primary street frontage of any site with 100 feet or more of frontage, provided, however, that in the case of a corner lot with two primary street frontages, the 70% minimum shall apply only to the primary street of greater distance and the primary street frontage of lesser distance shall require only 25% coverage.

B. Building shall be set back no more than 10 feet from the street line, with the exception of buildings of 100 feet or more in height, which shall be set back from the street line no more than 10% of the height of the building; provided, however, this requirement shall not apply to any building used exclusively for residential use.

C. No paved surface shall occupy more than 66% of the total lot area; the remaining lot area shall be for building coverage or landscaping.

D. There shall be an interruption of the facade wall plane with entrances, windows, and/or approved design indentations at intervals of no more than 20 feet.

E. The principal building entrance shall be along or connected to the primary street frontage. The principal building entrance shall be along the primary street frontage for any building whose dimension along the primary street frontage is in excess of 100 feet.

...  

G. Design and materials that suggest rural, rustic or non-urban characteristics shall not be permitted.

H. Roof top and other mechanical equipment shall be treated as an integral part of the building design.

II. Site Considerations

A. Landscaping, screening, and amenities

1. Any area between the street line and building facade shall be landscaped and improved with grass, trees, shrubs, and/or other appropriate materials.

2. Fences or walls shall be of materials and design compatible with the building; fences shall not be chain link or barbed wire.
Form Based Codes:
Practical & Legal Considerations

3. Trash and garbage receptacles and mechanical equipment, including electrical transformers and other utility equipment, shall be screened with appropriate and harmonious materials. 4. No outdoor storage of any materials or items shall be permitted.

B. Circulation

1. The maximum number of driveways shall be as follows:

   1 for up to 150 feet of frontage;
   2 for 150 feet to 500 feet of frontage;
   3 for 500 feet or greater frontage;

   1 additional driveway for each additional 500 feet of frontage.

C. Parking

1. No off-street parking, loading, or service areas shall be provided between any building and the primary street line.

2. Parking, loading and service areas shall be screened from any street view with fences, walls hedges, or a combination thereof.

III. Signage

A. Building identification signs shall be integrated into the building design.

B. No freestanding signs shall be allowed in excess of 48 square feet nor higher than 15 feet.

C. No outdoor advertising signs shall be allowed in excess of 48 square feet nor higher than 15 feet.

D. No attached sign shall extend higher than the roofline or parapet of any building or structure. *433 E. No sign shall flash, blink, or fluctuate.

F. No sign shall be animated or change physical position by any movement.

G. No sign shall have a maximum gross area in excess of 5% of the total square foot area of a building wall. In multiple-story buildings the total height of the wall shall not exceed twenty feet for computation purposes.

H. In no case shall the maximum gross area of signage on the facade or any side of a building exceed 70 square feet.

I. Permitted signs not requiring design review include: directional and informational signs, sale, exchange, or lease signs, and other signs of a temporary nature. Such signs shall only be displayed on property involved and shall be limited in size to 15 square feet per sign.
Respondents are the owners of real estate used as a Phillips 66 gasoline station and car wash located within the MSSRD at the corner of 39th Street and Main Street. Respondents wished to rebuild the station in a way allowable by the underlying zoning (C-3a2) but in conflict with the provisions of the special review overlay district created by Ordinance 59380.

The trial court, after considering the facts stipulated to by the parties and the trial briefs that were filed, upheld the validity of Sections 39.810 and 39.811. The court did not, however, find Ordinance 59380 to be valid, but held it to be unconstitutional stating:

Section 39.811 prevents Special Review Districts from modifying the land use regulations for the underlying district. The Plaintiffs argue their use has been modified. The City argues that there is no modification since a new station can be constructed, as long as it is within the ten feet set back requirement. This reasoning is specious. Requiring a new service station to have it's building within ten feet of the street is clearly a modification and is impermissible under Sec. 39.811. The Court thus holds that the effect of Ordinance # 59380 with the ten feet setback requirement is so burdensome as to these plaintiffs as to be confiscatory. It conflicts with the enabling ordinance as well. The Ordinance is therefore held to be unconstitutional and declared invalid.

The trial court overruled appellant’s motion for a new trial or for reconsideration. Appellant pointed out that the City Plan Commission, one day prior to the trial court’s order, approved an exception to the MSSRD, waiving the ten foot setback and other requirements so as to allow the construction of a new facility on respondents’ property. This appeal was filed challenging that part of the trial court’s judgment declaring Ordinance 59380 invalid. The court’s upholding the validity of Sections 39.810 and 39.811 has not been challenged.

[1] Appellant claims that the trial court erred in holding the MSSRD void in that the burden of proof had been improperly shifted as there is a presumption of validity attaching to any legislative act. Appellate review of a court tried action is circumscribed by the often cited Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). The judgment of the trial court will not be disturbed unless it is not supported by substantial evidence, it is against the weight of the evidence or it erroneously declares or applies the law. Id.

[2] [3] A zoning ordinance carries with it the presumption of validity. Gerchen v. City of Ladue, 784 S.W.2d 232 (Mo.App.1989). The person challenging the reasonableness of the ordinance bears the burden of proving that it is unreasonable. Renick v. City of Maryland Heights, 767 S.W.2d 339, 342 (Mo.App.1989). Whether or not application of an ordinance is reasonable and constitutional as applied to a particular property depends upon the facts, circumstances *434 and evidence in each case. Loomstein v. St. Louis County, 609 S.W.2d 443, 446 (Mo.App.1980).

[4] A two-step analysis is required in the review of a zoning decision. First, the court must examine the evidence of the property owner to determine whether the presumption of reasonableness was rebutted. Next, the court must examine the government’s evidence in order to see whether the
continuation of the present zoning is an issue which is fairly debatable. Renick v. City of Maryland Heights, supra, 767 S.W.2d at 342.

[5] Review of the facts in the instant case show that the burden of proof was not improperly shifted and that respondents met their burden rebutting the presumption that Ordinance 59380 was reasonable. Section 39.8111(I)(c), the underlying ordinance, states in part that, "in no event shall the District SR requirements modify the land use regulations for the underlying district." The MSSRD does not comply with § 39.811. See State ex rel. Casey's Gen. Stores, Inc. v. City of Louisiana, 734 S.W.2d 890, 895 (Mo.App.1987). The underlying zoning for respondents' property is C-3a2, allowing for an unrestricted use of that property so long as the requirements set forth in C-3a2 are complied with. Ordinance 59380 adds additional requirements restricting the manner in which respondents can use their property above and beyond those requirements of the C-3a2 zone.

Some of these requirements include the mandatory ten foot setback, the regulation of building materials, the parking regulations and the restrictions applying to signs, building entrances and windows. All of these requirements are confiscatory and unconstitutional. The trial judge was correct in setting aside the whole MSSRD for these reasons alone, arguing that to do otherwise would be to "bless the surviving sections with judicial approval." This he clearly could not do as such were in conflict with the underlying zoning.

[6] [7] Appellant claims that the issues decided by the trial court were not ripe for adjudication. Appellant's assertion misapprehends the nature of what a declaratory judgment purports to be. The fundamental requirement for jurisdiction to render a declaratory judgment is the presence of an actual, justiciable controversy between the parties as to their respective rights and duties where relief by judgment will be conclusive and determinative of the issues involved. Wentzville Pub. School Dist. v. Paulson, 699 S.W.2d 132 (Mo.App.1985). Where there is a dispute as to the legal rights of the parties, the violation of such rights is not a precondition to the availability of a declaratory adjudication. Higday v. Nickolaus, 469 S.W.2d 859 (Mo.App.1971).

[8] As a result of the enactment of Ordinance 59380, appellant has restricted the use of respondents' property. Respondents wish to build a new gasoline service station in a way not allowable under the new regulations. Furthermore, respondents challenged the entire ordinance as facially unconstitutional. In such an action respondents are not required to file for a building permit before making their challenge. See Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); Pennell v. City of San Jose, 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988). It is also no answer for appellant to assert that the action was untimely because respondents had filed for a variance. The Catch-22 appellant would place respondents in remains as long as the ordinance remains on the books. Appellant's Point I is denied.

Appellant next claims that the trial court erred in declaring the ten foot maximum setback so burdensome as to be confiscatory and the MSSRD to be unconstitutional because respondents did not carry their burden of proof. An ordinance is presumed to be valid but this presumption is rebuttable and while an ordinance may be valid in its general aspects, "as to be a particular state of facts involving a
particular owner affected thereby it may be so clearly arbitrary and unreasonable as to be *435 unenforceable." Wilson v. City of Waynesville, 615 S.W.2d 640 (Mo.App.1981). The person challenging the validity of the ordinance has the burden of proving that it is unreasonable. Id.

Respondents have met their burden of proof as to the unreasonableness of the ordinance. The determination of reasonableness "may be based on the face of the ordinance or on a state of facts which affects its operation." Schlett v. Antonia Fire Protection Dist., 685 S.W.2d 589, 591 (Mo.App.1985). The ordinance in question, Ordinance 59380 is defective both on its face and under the facts peculiar to this case.

The ten foot maximum setback is arbitrary and unreasonable insofar as it affects the use of respondents' property as a gasoline station. It is in conflict with the enabling ordinance and the underlying C-3a2 zoning. Appellant's argument that this did not limit respondents in their use since the district allows some thirty-plus uses completely ignores the practicalities of operating a gas station. By no stretch of the imagination can a gas station built within the ten foot allowance. The trial judge recognized the absurdity of appellant's argument, calling such reasoning "specious." We agree.

The ordinance is unconstitutional on its face. Many provisions are in conflict with the existing zoning and thus violative of the enabling ordinance. Many provisions are confusing and ambiguous, i.e. what exactly constitutes "rural, rustic or non-urban characteristics?" A cursory review of the other provisions for signage, parking and the like also show conflict with underlying zoning provisions. Appellant's Point II denied.

[9] Appellant, in Point III, challenges the action of the trial court in striking the entire MSSRD, even if the ten foot setback is held to be confiscatory as there is no evidence that the entire ordinance would not have been passed without the maximum setback. Appellant cites Wilson v. City of Waynesville, supra, 615 S.W.2d at 642, for the proposition that, "[a]lthough an ordinance contains an invalid provision, the remainder of the ordinance should not be stricken down as void unless it may be found judicially that the city counsel would not have passed the entire enactment if it had known of such invalidity."

The ordinance in question has many provision intertwined with the setback provision. The setback provision states:

B. Buildings shall be set back no more than 10 feet from the street line, with the exception of buildings of 100 feet or more in height, which shall be set back from the street line no more than 10% of the height of the building; provided, however, this requirement shall not apply to any building used exclusively for residential use.

Other provisions depend upon the setback to give them meaning. The parking provision, for example, states that:

1. No off-street parking, loading, or service areas shall be provided between any building and the primary street line.
Form Based Codes: 
Practical & Legal Considerations

The landscaping provision states:

1. Any area between the street line and building facade shall be landscaped and improved with grass, trees, shrubs, and/or other appropriate materials.

The area referred to in these provisions is, of course, the setback area. There is no way of telling what these provisions mean without reference to some footage requirement. Appellant's Point III is denied.

Finally, appellant contends that the trial court erred in denying its motion for a new trial or reconsideration because it established that new evidence bearing directly upon the court's decision would have affected a different result. One day prior to the July 18, 1990, order the respondents were granted a partial conditional variance relieving them of the burden imposed by the ten foot maximum setback.

Motions for a new trial based upon newly discovered evidence are viewed with disfavor and are granted only in exceptional circumstances. City of Eureka v. Hall, 687 S.W.2d 917, 920 (Mo.App.1985). The decision whether to grant a new trial on the basis of newly discovered evidence rests in the sound discretion of the trial court and this decision will not be disturbed upon appeal unless an abuse of that discretion has occurred. Fahy v. Dresser Indus., Inc., 740 S.W.2d 635, 643 (Mo. banc 1987). The party who is seeking a new trial has the burden of showing that the newly discovered evidence is so material that a different result would probably be had should the new trial be granted. Id. Appellant did not carry this burden.

The trial court held the ordinance to be unconstitutional. The grant of a partial variance to respondents does not change this result and appellant cannot demonstrate otherwise. Respondent was still subject to other provisions of the ordinance not covered by the partial variance thus the issue was not moot as suggested by appellant. Appellant's Point IV is denied. The judgment of the trial court is affirmed.

All concur.


Dallen v. City of Kansas City
Introduction
- What is a code?
- What role does a code play in the development process?
- What are the legal issues?
- What are the options?

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

Types of Codes
- Conventional
- Growth management
- Performance-based
- Design-based
- Unified

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
  - Transit-based zoning
  - Alternatives vs. No alternatives
  - Uses NU jargon
  - Requires powerful constituency

Source: Duany Plater-Zyberk & Co.
NU/Form-Based v. TOD Codes

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<th>Standard</th>
<th>NU/REZ</th>
<th>TOD</th>
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<td>Critical</td>
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<td>Neighborhood scaled</td>
<td>Urban scaled</td>
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<tr>
<td>Parking</td>
<td>Hidden</td>
<td>Capped</td>
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Myths & facts

- **Myth**: Developers do not produce good communities because zoning makes them illegal
- **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**: “Codes should tell applicants what they can do, not what they cannot do”
- **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
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)
  - Some obstacles exist for multiple use “pod” PUD
  - Form-based codes make better community design a by right option

Top 10 New Urbanist Jargon Words and Phrases

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

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
Myths and Facts

- “Graphics can replace acres and acres of text”
- Facts:
  - Graphics require a written explanation
  - Many code provisions are textual (e.g., procedures)
  - BUT graphics can clarify vague or confusing language

Inappropriate Use of Graphics

Use v. Building Form

Uncivic Design

<table>
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<tr>
<th>New Home Construction</th>
<th>1976</th>
<th>2002</th>
<th>%</th>
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<tr>
<td>Average building sf</td>
<td>1,700</td>
<td>2,320</td>
<td>36%</td>
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<tr>
<td>Average lot size (sf)</td>
<td>10,125</td>
<td>16,454</td>
<td>63%</td>
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Objectives

- Use the code
- Produce outcomes we expect
- Balance
- Quality
- Predictability
- Fairness
- Advance notice of what is coming
- Durability
- Sustainability

Steps to Code Reform

- Plan
  - Start with a good plan
  - Select a project manager
  - Identify your budget
  - Select a code writer or consultant
  - Write a clear scope
- Scope
  - Select a project manager
  - Identify your budget
  - Select a code writer or consultant
  - Write a clear scope
  - TIA to people
  - Listen to people
  - Facilitate
- Public Process
  - Diagnose your code
  - Decide what kind of code you want
  - Diagnose your code
  - Decide what kind of code you want
  - Start with a good plan
  - Select a project manager
  - Identify your budget
  - Select a code writer or consultant
  - Write a clear scope
  - TIA to people
  - Listen to people
  - Facilitate
  - Train the staff
  - Train the applicant
  - Talk to people
  - Listen to people
  - Facilitate
  - Train the staff
  - Train the applicant
- Write
  - Buy the 21st Century LDC
  - Write the standards
  - Visit the standards
  - Talk to people
  - Listen to people
  - Facilitate
  - Train the staff
  - Train the applicant
- Adopt
  - Start with a good plan
  - Select a project manager
  - Identify your budget
  - Select a code writer or consultant
  - Write a clear scope
  - TIA to people
  - Listen to people
  - Facilitate
  - Train the staff
  - Train the applicant
- Train
  - Start with a good plan
  - Select a project manager
  - Identify your budget
  - Select a code writer or consultant
  - Write a clear scope
  - TIA to people
  - Listen to people
  - Facilitate
  - Train the staff
  - Train the applicant

Legal Requirements

- Authorized
  - Delegation
  - Preemption
- Constitutional
  - Due process
  - Takings
  - Equal Protection
- Enforceable
  - Aesthetics
  - Uniformity
  - Vagueness
  - Spot zoning

Local Authority

- Preemption
  - Home Rule
    • General Police Powers
    • Grants of Authority
  - Dillon’s Rule

Form-Based Code Ingredients

- Building + Lot + Infrastructure = Form
  - Zoning
  - Subdivision

White & Smith, LLC
Standard Zoning Enabling Act

SEC. 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; 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.

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

Standard Planning Enabling Act

- Public improvements
- Official mapping
- Planning Commission approves public facilities
- Rarely litigated

Code of Virginia (§ 15.2-2280)

"... regulate, restrict, permit, prohibit, and determine the following:

1. The use of land, buildings, structures and other premises for agricultural, business, industrial, residential, flood plain and other specific uses.

2. The size, height, area, bulk, location, erection, construction, reconstruction, alteration, repair, maintenance, razing, or removal of structures.

3. The areas and dimensions of land, water and air space to be occupied by buildings, structures and uses, and of courts, yards, and other open spaces to be left unoccupied by uses and structures,..."
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 district the possibilities of such homes securing daily family conveniences and necessities such as groceries, drugs, and gasoline for the family car, with ice 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

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
  - Penalties 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 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, forthcoming)
- Freilich & White, 21st Century Land Development Code (APA, forthcoming)
- E. Garvin, Understanding Form Based Regulations (International Municipal Lawyers Association, Portland, Oregon – September 18, 2006)

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

Conclusions

Use Patterns

1. Design templates for multiple-use developments
2. Optional
3. Parts of UDC not applicable (e.g., buffers for commercial retrofit, tree preservation for conservation)
4. 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

Traditional Neighborhood Development (TND)

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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