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Form-Based Codes

Form Based Codes and Land Use Law: Thoughts from the Field

Elizabeth Garvin, Esq., AICP
Clarion Associates
621 17th St. Suite 2250
Denver, CO 80293
Telephone 303 830 2890
egarvin@clarionassociates.com

Nancy E. Stroud, Esq., AICP
Lewis Stroud & Deutsch, PL
1900 Glades Road, Suite 251
Boca Raton, FL 33431
Telephone 561 826 2800
nstroud@lsdlaw.net

Dawn Jourdan, Esq., Ph.D.
Assistant Professor, Urban and Regional Planning
Affiliate Professor, Law
University of Florida
(352) 392-0997 ext. 428
dawnjourdan@ufl.edu

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1. Changing Zoning Codes

Land use regulations are evolutionary creatures. This, despite a decided lack of scientific inquiry, is evident from a simple comparison of a typical zoning ordinance circa 1977 and, 30 years later, a typical form-based code[1] circa 2007. The 1977 zoning code contains some general provisions, a list of zone districts in which there are some basic site dimensions and individual laundry lists of permitted uses, parking requirements, and administrative procedures for rezoning, special use permits, and variances. The very new, completely revolutionary idea contained in this code is a planned unit development district that allows the governing body and applicant to negotiate individual site development standards. Subdivision regulations are handled in a separate document. This code may or may not implement a comprehensive plan. The 1977 code was drafted by the municipal attorney and it looks very much like a legislative document.

The 2007 form-based code starts out with comforting similarity – a section of general procedures. From there, however, things look very different and the language and layout change dramatically. Most form-based codes have evolved from the SmartCode[2] and are organized around the concept of a "transect" that represents a cross-section of a community.[3]



SmartCode Transect

All pieces of the community can be located somewhere along the transect. Zone districts, now called "transect zones" are labeled accordingly from T-1

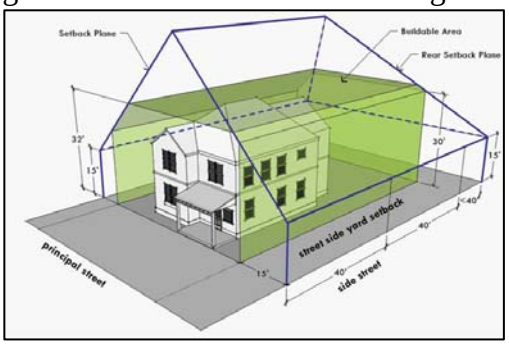
[1]. Form-based codes are: "[a] method of regulating development to achieve a specific urban form. Form-based codes address the relationship between building facades and the public realm, the form and mass of buildings in relation to one another, and the scale and types of streets and blocks. The regulations and standards in Form-based codes, presented in both diagrams and words, are keyed to a *regulating plan* that designates the appropriate form and scale (and therefore, character) of development rather than only distinctions in land-use types. This is in contrast to conventional zoning's focus on the micromanagement and segregation of land uses, and the control of development intensity through abstract and uncoordinated parameters (e.g., FAR, dwellings per acre, setbacks, parking ratios, traffic LOS) to the neglect of an integrated built form. Not to be confused with design guidelines or general statements of policy, Form-based codes are regulatory, not advisory." www.formbasedcodes.org/definition.html (last visited September 10, 2009

[2] The SmartCode is a model code that provides an organizing framework for the form-based regulatory concepts discussed in this paper. It is an open source code available at www.smartcodecentral.com.

[3] According to the Smart Code v 9.2 (pg. vi), transect derives from an 18th century transect of nature that "is a geographical cross-section of a region intended to reveal a sequence of environments."

Natural Zone, to T-6 Urban Core Zone. Unlike conventional[4] zoning, the form-based code does not implement a single comprehensive plan, but requires the creation of one or more regulating plans that are then integrated into the code. Different combinations of the T-zones are used to guide the build-out of each plan area. Within the T-zones, the following aspects of development may be regulated: vehicular lane dimensions, design of on-street parking, lot frontage on a public street (including specifics for location of structure, driveway, curb, walkway, and landscaping), specifications for public lighting and landscaping, building frontage (with the following types – yard, porch, terrace, forecourt, stoop, shopfront, gallery, and arcade), building configuration, location of building on lot (called disposition), building functions (e.g., residential, lodging, office, retail, civic, or other), parking requirements, combinations of building functions and uses, required civic spaces, and illustrations of how all of these things come together. The form-based code is premised on the idea that the public input takes place with the creation of a regulating plan, so the administrative procedures are typically fairly limited and focused on development that deviates from the very specific regulations. The 2007 form-based code was probably drafted by an architect, planner, or landscape architect and it looks more like a construction document than a legislative document.[5]

Why the change? Actually, zoning ordinances have been evolving for years and the jump from conventional to form-based code is not as drastic in many communities as the example provided above. Conventional codes have been updated to include standards for: landscaping, open space and parks, mobility and connectivity, lighting, small lot development, infill development, sustainability, street sections, and building design standards. Development measurement standards have also gone through multiple iterations, and communities now look beyond basic maximum lot sizes and minimum yard sizes to a sliding scale of measurement and building size that considers the location, dimensions, and overall envelope of the structure on the lot. Many of the



Conventional code measurement tools, Clarion Associates

[4] The term "conventional" is often used in the derogatory by some proponents of the Smart Code and/or new urbanists based on a belief that our historic approach to zoning has damaged the fabric of communities by forcing an artificial separation of uses that is the underpinning of suburban sprawl. The authors of this paper, maintaining a position of neutral observers, use the term conventional only to describe a contrast between smart code-oriented regulations and the historic approach to zoning.

[5] Which is not to say that attorneys have not been involved in preparing and updating the SmartCode. Many have and their imprint can be seen in sections such as 2.5 (G-1) Restricted Growth Sector, "the Restricted Growth Sector shall be assigned to areas that have value as Open space but nevertheless are subject to development, either because the zoning has already been granted or because there is no legally defensible reason, in the long term, to deny it."

concepts included in form-based codes have counterparts in comprehensive current codes. A simplified comparison of typical codes looks like this:

Comparison of Typical Contents: Conventional and Form-Based Codes					
● - contains this provision			❍ - contains a limited version of this provision		
Item	**Conv.**	**FBC**	**Item**	**Conv.**	**FBC**
General Provisions	●	●	Infrastructure Requirements	●	❍
Regulating Plan		●	Detailed Procedures	●	❍
Districts	●	●	Vested Rights		
Uses	●	❍	Review for state/federal legal issues		
Ability to Mix Uses	❍	●			
Landscaping	●	●	Building form standards		●
Parking	●	❍	Building design standards	❍	❍
Parks and Open Space	❍	●	Supplemental use regulations	●	
Mobility and Connectivity		●	Infill development standards	❍	●
Sustainability	❍	❍	Nonconforming Uses	●	❍
Neighborhood-level design		●	Enforcement	●	

The underlying change, however, is that most conventional codes do not anticipate the built form and pattern of the community, relying instead on the development community and market to bring applications for development forward. Form-based codes start by defining the pattern and built form of the community and then allow the development community to work within those parameters. In this paper and presentation, we will explore the impacts of form-based codes on the municipal legal community and how this approach to the regulatory process should be enhanced to provide better clarity for local decision-makers and the development community.

2. Smart Code 101

With a great deal of respect to the communities who had form-based ordinances before this regulatory concept had a name, the creation and use of the SmartCode was one of the key organizing factors behind the growth of the form-based codes movement. Like all regulatory documents, the SmartCode has its strengths and weaknesses, both of which have legal implications. To provide

more detail to the description above, and background for practitioners who are new to this concept, the SmartCode works generally as follows.[6]

Regulating Plan

The first step in SmartCode implementation is the creation of a regulating plan, or more commonly, regulating plans. Unlike a comprehensive plan, and more like an area plan or neighborhood plan, a regulating plan works at the lot level. The regulating plan shows locations for buildings, street types, and some design features, including street, alley, and block structure; street design; build-to, yards, and massing; horizontal and vertical mix of uses; parking locations and requirements; and open spaces and civic buildings.[7] Because of the level of detail required, some communities decide to apply a form-based regulatory process only to specific geographic areas, such as commercial corridors or the downtown.

A regulating plan is typically created through a charrette – a public involvement process that runs from a few days to a week in length and involves drafting and feedback of local development patterns and design preferences. During the charrette, local planners or consultants will have multiple meetings and workshops were they test ideas with the staff or public. A charrette may include a visual preference survey; essentially a line-up of design ideas presented to the community for comment. For example, a community may be asked which design they prefer for multifamily development (right), or how pedestrian connections should be organized in the community. It will also include on-site design/sketch work that is displayed for comment and discussed through the multiple meetings. Over the duration of the charrette, the planners will focus and refine the plan and design information to meet the community consensus on various issues. Much of the information gathered in the charrette is then woven into the regulatory document. The first work product of the process is typically the regulating plan, which looks something like one or more of the maps below.





[6] Some municipal attorneys may question whether there is authority in their jurisdiction for form-based codes. Typically, this has been answered in the affirmative given that the broad language of the Standard Zoning Enabling Act, adopted by many states, closely reflects many of the key tenants of form-based codes. Additionally, Connecticut, California, Pennsylvania, and Wisconsin have specifically enabled these codes and many states are considering such a change. See Robert Sitkowski, Anna Breinich, and Brian Ohm, *Enabling Legislation for Traditional Neighborhood Development Regulations*, PLANNING, 1 (Oct. 2001).

[7] Joel Russell, City of Palo Alto Zoning Ordinance Update: New Urbanism Discussion Paper, January 25, 2002 (www.city.palo-alto.ca.us, last visited 07/28/2006).



Sample regulating plans courtesy of Farr Associates

While many municipal attorneys prefer to wait for a draft of any ordinance prior to review, participation in the charrette process is an excellent opportunity to understand the regulatory issues that will be addressed and anticipate challenges that may arise through the code drafting process. The charrette is where many of the more important policy issues are raised for community consideration, such as whether the community wants to require a vertical mix (buildings must contain uses from at least two categories, such as retail and residential), or whether street sections will need to be modified from existing measurements to form-based preferred specifications. Additionally, this is where the first series of legal questions is presented: if the regulating plan is adopted as part of the form-based code, what procedures are necessary if an applicant does not want to conform to the plan, and what procedures are necessary to amend the plan or prepare a new plan. There is also an overriding question of whether the regulating plan must be in conformance with the jurisdiction's comprehensive plan. We will discuss these further in the third section of this paper.

Instead of preparing a regulatory plan at the outset, some communities are taking a different approach and by-passing the creation of a regulatory plan in favor of creating a process to prepare the necessary regulatory plan(s) in the future. The rest of the code provisions are put in place and the community addresses the regulatory plan issue as their priorities and funding dictate. This does not change, however, the legal questions raised above and a municipal attorney should answer these questions as the draft code is prepared.

Calibrating the Code Text

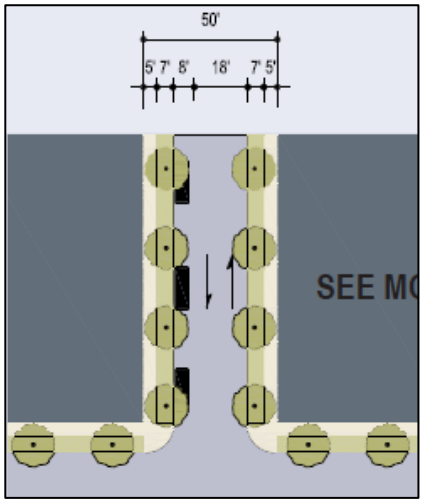
Following creation of the regulating plan, the code text is drafted. In SmartCode terms, the text of the model is "calibrated." This is similar to redrafting a model code to meet the needs of the local community. All of the aspects of the code must be calibrated to reflect the community and then some pieces are put together into "assemblies." A simplistic description of this includes actions such as:

- Determining which transect zones are applicable to the community from the following:
    - T-1 Natural Zone
    - T-2 Rural Zone

- T-3 Sub-urban Zone
- T-4 General Urban Zone
- T-5 Urban Center
- T-6 Urban Core

and then further determining whether subdistricts will be necessary to accurately represent specific development areas;

- Making vehicular lane dimension assignments to correlate street lane widths to transect zones and then allocating the appropriate types of on-street parking;
- Identifying applicable public frontages, i.e., are there highways in the community and, if so, how should buildings and yards front on highways? The public frontages are then made more specific by adding curbs, walkways, and landscaping. These are brought together with the lane dimensions and parking to create "thoroughfare assemblies."



SmartCode Table 4.C Thoroughfare Assemblies

- Specifying appropriate public lighting and landscaping;
- Identifying applicable private frontages – the area between the building façade (front wall) and front lot line. These might include yards, porches, terraces, courtyards, stoops, shopfronts, galleries, or arcades;
- Describing the appropriate building configuration, a concept that incorporates building height and stepback (places where a building might be stepped back along a wall) requirements;
- Incorporating building disposition requirements – closely related to yard setbacks;
- Locating different building functions; e.g., retail structures should be located at the 100 percent corner in the community, while residential might be located elsewhere;



SmartCode Table 13 Civic Space

- Allocating parking requirements and uses (that are closely connected to structure types);

- Determining how civic spaces are located (parks, green space, squares, plazas, and playgrounds); and then

- Pulling all of these requirements together to identify appropriate development in each T-zone.

It is easy to see from the contents of this list that numerous planning, policy, and regulatory decisions are made as a form-based code is created for a community. During the calibration process, three types of changes to the model are possible: 1) where parts of the regulations will be adopted generally as-is, simple cut-and-paste is necessary to insert relevant local information; 2) where the model is applicable in concept but must be modified more significantly, redrafting of the model is necessary; and 3) where the model is not applicable, new language must be drafted or a "module" applied. Modules are add-on code components that address a particular issue, such as: affordable housing, incentives, retail markets, or solar energy. Modules are drafted by individuals and consulting firms and added to the Smart Code.

As with other regulatory drafting, the new code text must be reviewed to determine: 1) consistency of terminology, 2) accuracy of cross-referencing (to maintain a shorter, more streamlined approach, the Smart Code is filled with cross-references), 3) whether the substance of the code is legally acceptable and enforceable in the community (e.g., are street trees required where the public works department would prohibit them?), and 4) whether the calibration is sufficient or the code still looks too much like a model. The code should also be reviewed to determine if any aspects of the current regulations have been left on the table. For example, if the local jurisdiction had a park impact fee, how has that been accounted for in the new code? Discussion among professional code consultants has identified two key and persistent procedural issues with form-based codes that require the attention of the municipal attorney. First, the procedures recommended by the SmartCode are generally regarded as insufficient to ensure either proper review or, potentially, legal review. We discuss this in greater detail in Section Two of this paper. The second arises out of the very specific nature of a form-based code. In practice, a form-based code is very much like a master PUD. Once in place, the PUD and form-based codes both create mini-zoning ordinances for a specific site. The community must determine how to handle future amendments and changes to the development regulations.

3. Unsettled Legal Questions Pertaining to FBCs

The absence of litigation in the realm of form based codes is an indication of the newness of these types of regulations, rather than a statement of their impenetrability. We will look to case law pertaining to zoning, as well as those regulations applicable to aesthetics, to discern potential legal challenges to which FBCs may be susceptible.

Applicable Precedent: Zoning, Urban Design, a Combination

A fundamental first question in anticipation of law suits challenging form based codes relates to the line of precedent to which courts may refer for review. While meant to replace traditional zoning regulations, form based codes are quite different than zoning codes. FBCs do not prescribe land use. Instead, these codes seek to guide development by offering a series of prescriptions about the form of development. In many ways, FBCs more closely mirror aesthetics regulations like urban design, historic preservation, and signage regulations. However, they are much more comprehensive in scope and content than most aesthetics regulations. As the FBC does not fit neatly into either of these regulatory types, courts may be left to determine which regulatory scheme applies.

The answer to this question may lie, at least in part, in the interpretation of enabling legislation. For decades, State enabling legislation has served as the authorizing tool for zoning regulations. FBCs are distinct from the type of zoning ordinance validated by the Supreme Court in *Euclid v. Ambler Realty*.[8] There, the court upheld a regulation that expressly segregated land uses by type with little regard for form. In spite of the differences, Sitkowski provides a skillful analysis of how, if challenged, municipalities might argue that the FBC is justified by the language pertaining to the "grant of power" of the SSZEA. Specifically, he argues that the grant of power contains language which allows municipalities to regulate: "height, number of stories, and size; lot coverage; yards, courts, and other open spaces; density; and location of use of structures and land."[9] According to Siktowski, these grants of power pertain expressly to the form of development, providing some legal basis for regulation which is form-based.[10] He continues:

> Contrary to conventional belief, then, the SSZEA is not exclusively use-based; indeed, it does not arguably show a preference for use over form. Accordingly, there should be sufficient support for a form-based approach in even SSZEA-influenced states.[11]

Despite this compelling argument, the California legislature has amended its enabling legislation. In California, the legislature modified its enabling legislation by expressly recognizing form based regulations.[12] In the absence of State legislation expressly enabling form based regulations, municipal attorneys should look to case law where the regulation of aesthetics has been justified.

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[8] 272 U.S. 365, 47 S.Ct. 114 (1926).

[9] Robert J. Sitkowski and Brian W. Ohm, Form-Based Land Development Regulations, 28 Urb. Layer. 163, 166 (April, 2004)..

[10] Id.

[11] Id. at 167.

[12] Cal. Gov't Code Section 65302.4 (2005).

It may also be appropriate to seek justification from case law validating other forms of design regulations. There has long been a discussion regarding the constitutionality of land use regulations based solely on aesthetics. For example, in *State v. Brown*,[13] the North Carolina Supreme Court deemed an ordinance requiring the screening of junkyards an unconstitutional exercise of police powers because the regulations was motivated by concerns for aesthetics alone. The *Brown* opinion was again validated by the State's high court in 1960 in *Restaurant Inc. v. Charlotte*, 252 N.C. 324, 113 S.E.2d 442. In this case, the court invalidated a sign regulation which prohibited the display of sights over sidewalks in certain areas of the City. The Court wrote:

> Courts are properly hesitant to interfere with a legislative body when it purports to act under the police power, but the exercise of that power must rest on something more substantial than mere aesthetic considerations. If it appears that the ordinance is arbitrary, discriminatory and based solely on aesthetic considerations, the court will not hesitate to declare the ordinance invalid.[14]

This type of jurisprudence which mandated that aesthetics alone was not a sufficient exercise of police power was commonplace in most jurisdictions until the 1950s.

The High Court's decision in *Berman v. Parker*, 348 U.S. 26, 33, 75 S.Ct. 98. 102 (1954) brought about new dicta which would be used to justify aesthetics only regulations. There, the court wrote"[I]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, specials as well as clean, well balanced as well as carefully patrolled." This decision did not fully impact jurisprudence in North Carolina until 1979. In A-S-P Associates v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979), the North Carolina Supreme Court was asked to review the validity of a historic district ordinance which included architectural guidelines and design standards. The court held that the police power did include the right to control the exterior appearance of structures as related to the preservation of historically significant resources.[15] The court, however, left open the question as to whether aesthetics alone was a sufficient basis for regulations not tied to some larger public purpose.[16] Advocates of FBCs persuasively argue that this new archetype of regulation is based on more than mere aesthetics.

As a result of this and other concerns, many communities have adopted what are referred to as hybrid codes. These are essentially FBCs that include

[13] 250 N.C. 54, 108 S.E.2d 74 (1959).

[14] Restaurant Inc. v. Charlotte, 252 N.C. 324, 326, 113 S.E.2d 422, 424 (1960).

[15] Id.

[16] Id.

prescriptions regarding land use. For example, Ventura, California adopted a form-based code with conventional zoning, which is essentially "spliced into the existing zoning as stand-alone chapters…"[17] Grass Valley, California took a similar approach, integrating a form based code into a citywide code. In that case, the form based regulations applied specifically to historic neighborhoods in the downtown and surrounding areas which required significant redevelopment.[18] In a third approach toward integration, the Town of Flower Mound, Texas created a floating form based code which fostered the use of tool to encourage mixed use infill development in several areas in the town.[19] From a legal perspective, these hybrids may be more defensible, as they follow a more traditional approach to zoning but are enhanced by detailed design principles. The factor which enhances the defensibility of these hybrid codes is the administrative processes outlined therein mirror the procedural due process components of zoning codes, as more fully defined below.

Due Process

According to Garvin and Jourdan,[20] form based codes are more susceptible to due process challenges than typical zoning ordinances. As previously explained:

> Zoning ordinances, by nature, are specific as to how a structure may be built and used in a given location. As a result, when a decisionmaker denies an application for a building permit, variance, or rezoning under a traditional zoning ordinance, said denial is tied to a specific provision in the ordinance which disallows either the structure or the use. Decisionmakers have little discretion in the presence of such specific rules and, as a result, their decisions will typically stand unless proven arbitrary or capricious.
>
> Form-based codes, however, are not intended to be as rigid. These codes act more like guidelines which provide little guidance of what must be permitted or prohibited. The flexibility of these codes, while it may improve the overall mixture and quality of development in a given transect, may vest too much discretionary power in the hands of decisionmakers who have very limited

[17] Rangwala, Kaiser. Hybrid codes versus form-based codes. New Urban News. April and May 2009, p. 13-14.

[18] Id.

[19] Id.

[20] Elizabeth Garvin and Dawn Jourdan, Through the Looking Glass: Analysing the Potential Legal Challenges to Form-Based Codes, 22 J. L.U. and Env. Law 395, 416 (Spring 2008).

working knowledge of the architectural, urban design, or planning principles upon which these ordinances are derived.[21]

Just as the case with zoning ordinances, the best way to avoid procedural due process challenges is to reduce the amount of discretion exercised by local officials in administrative, legislative, and quasi-judicial processes. For example, the Miami21 Code contains a substantial chapter which sets clearly identifies the processes and grounds for decisionmaking, significantly reducing the possibility of claims relating to the abuse of powers. It is in this level of specificity that the level of defensibility of form based codes rises to that typically associated with zoning challenges. By contrast, cities investigating the adoption of the Smart Code, the model form based code, should consider if the due process contained therein is enough to satisfy the local judiciary, if challenged.[22]

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[21] Id. at 417.

[22] Language of the model Smart Code follows:

1.4 PROCESS

1.4.1 Municipality hereby creates a Consolidated Review Committee ("CRC") comprised of a member from each regulatory agency having jurisdiction over the permitting of a project, a representative of the Development and Design Center, and the town architect, to process administratively applications and plans for proposed projects.

1.4.2 The geographic locations of the Sectors and the standards for the Transect Zones shall be determined as set forth in Article 2, Article 3, Article 4, and Article 5 through a process of public consultation with approval by the Legislative Body. Once these determinations have been incorporated into this Code and its associated plans, then projects that require no Variances or Warrants, or only Warrants, shall be processed administratively without further recourse to public consultation.

1.4.3 An owner may appeal a decision of the CRC to the Board of Zoning Adjustment and may appeal a decision of the Board of Zoning Adjustment to the Legislative Body.

1.4.4 Should a violation of an approved Regulating Plan occur during construction, or should any construction, site work, or development be commenced without an approved Regulating Plan or Building Scale Plan, the Board of Zoning Adjustment has the right to require the owner to stop, remove, and/or mitigate the violation, or to secure a Variance to cover the violation.

1.5 WARRANTS AND VARIANCES

1.5.1 There shall be two types of deviation from the requirements of this Code: Warrants and Variances. Whether a deviation requires a Warrant or Variance shall be determined by the CRC.

1.5.2 A Warrant is a ruling that would permit a practice that is not consistent with a specific provision of this Code but is justified by the provisions of Section 1.3 Intent. The CRC shall have the authority to approve or disapprove administratively a request for a Warrant pursuant to regulations established by the CRC.

1.5.3 A Variance is any ruling on a deviation other than a Warrant. Variances shall be granted only in accordance with _____Statutes, _____, as amended.

1.5.4 The request for a Warrant or Variance shall not subject the entire application to public hearing, but only that portion necessary to rule on the specific issue requiring the relief.

1.5.5 The following standards and requirements shall not be available for Warrants or Variances:

a. The maximum dimensions of traffic lanes. (See Table 3a.)

Takings

Like any other zoning ordinance, the goal of drafters is to ensure that the regulations do not infringe on private property rights to the extent that a court might ultimately require the payment of just compensation. Thus, the city attorney must envision the potential impacts of form based codes on all affected properties. The application of a form based code to a parcel of property may be problematic to the extent that it proscribes a form of development that is not feasible for the site in question. Section 3 of this paper provides a case study of the way the Miami21 form based zoning code was drafted to avoid some of the political and legal problems identified in Sections 1 and 2 of this paper.

4. The Miami21 Form-Based Zoning Code

The Form-Based code recently prepared for the City of Miami is an example of a hybrid code that follows many of the principles of the Smart Code but has been adjusted to the unique history and circumstances of the City. The experience of creating and adopting the Miami21 Code may provide useful lessons to other communities, especially as the Code is one of the most extensive efforts to adopt a Form-Based code in a major metropolitan, built-out city, and one that will apply throughout the entire city.

Background

The mayor of the City of Miami initiated the Miami21 planning process in the beginning of his first term as mayor eight years ago, which process included several components of a comprehensive, visionary blueprint for the future of the city. In addition to the overhaul of the current zoning code, the process included a Parks and Open Space plan for the entire city and master plans for various important recreational areas of the city; a Transportation Plan for increasing multi-modal use; an Economic Development plan; and certain Green Initiatives, including purchasing policies, a Climate Plan and LEED planning. This comprehensive approach formed a key foundation of the zoning changes adopted in the Miami21 Code.

The new code replaces one originally adopted in 1991, which typical of older codes had been amended piecemeal over the subsequent 28 years to form a patchwork of regulations that do not meet the needs of a redeveloping city, especially one that intends to redevelop in a sustainable way. The city identified several problems in the existing code that needed correction. First, the code did

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b. The required provision of Rear Alleys and Rear Lanes.
c. The minimum Base Residential Densities. (See Table 14b.)
d. The permission to build Accessory Buildings.
e. The minimum requirements for parking. (See Table 10.)

not provide predictability to the community or the developer because of the reliance for larger development projects on the existing discretionary permitting process that allowed zoning by negotiation between the city commission and the developer, usually represented by an elite group of zoning attorneys familiar with the code and the political process. As a related matter, any public benefits that resulted from the rezoning for larger projects (i.e. open spaces, affordable housing, green buildings, etc.) were negotiated on a case-by-case basis with little comparability from project to project. The code failed to adequately protect residential neighborhoods from the intrusion of higher density or intensity development at the borders of the neighborhoods. It discouraged mixed uses and failed to encourage design that fosters pedestrian activity and the benefits of an active and attractive environment at the level of the public street (the "street experience").

The Miami21 Code attempts to address these issues by adopting many of the Smart Code principles. These include:

- Transect-based districting, that allows for graduated increases in density, intensity and height but generally encourages a mix of uses in all but the least dense transects (existing single family neighborhoods).

- A regulatory process that de-emphasizes legislative discretionary approvals by relying instead on form-based regulatory standards, and increasing the use of administrative processes and standards for granting waivers to those standards.

- Form-based regulatory standards increase attention to the design of buildings and public spaces at the street level, for example by requiring more lively facades and appropriate sidewalks, parking, open spaces and setbacks.

- Appropriate transitions between single family residential areas and multifamily or commercial areas, including the use of building stepbacks and setbacks.

- Targeted use of commercial corridors to encourage transit-oriented developments and use a neighborhood centers.

- Emphasis on the downtown as a focus for the region's economy and culture

- Creation of a transfer of development rights system to protect historical districts.

- Extensive use of graphics and charts to create a more readable and understandable code.

The Miami21 Code was recommended by the city's Planning Advisory Board, and passed on first reading on September 4, 2009, after more than four years of extensive public charrettes, workshops, stakeholder meetings, and hearings. It is planned to be adopted at second reading in October or November, 2009.

Legal Issues in the Preparation of the Miami 21 Code

The drafters of the Miami21 Code[23] considered a number of legal issues that are relevant to any new zoning code, but which have special aspects when applied to form-based codes. The major issues are addressed here.

The first concern, and especially one in Florida, is that the new code must be consistent with the city Comprehensive Plan. The Florida growth management laws require that land development regulations be consistent with and implement the comprehensive plan, requiring a "closer fit" between the two than most states.[24] In Miami, this meant that the adopted comprehensive plan had to be amended to reflect the new policy orientation of the code, as well as the use, density and intensity changes in the transect zones (zoning districts) by amending the adopted Future Land Use Map. The coordination of the plan and the code changes means that the code changes cannot be effective until the plan changes are approved by the state, under the Florida system, for compliance with state statutory requirements.

Another major issue in the creation of new zoning districts and regulations is the potential for "downzoning" property to the extent that the reduction of development rights in the property runs afoul of constitutional limitations[25] or the state Bert J. Harris Act. The Act provides that a regulation that creates an "inordinate burden" on a property owner may have a remedy of compensation from the government for the reduction of value. [26] To address this issue, the team analyzed the development capacity in each existing zoning district, and made a diligent effort to ensure that the development capacity of the new transect district to be applied to properties was roughly equivalent. Height limits were reduced in the most intense districts, but total allowable square footage was made equivalent. Bonus height and density are allowed in exchange for certain public benefits that include options to pay fees, dedicate lands, or build the benefits. Few zoning district boundaries were radically changed. In the new districts, the allowed mix

[23] The Code was drafted by a team consisting of the town planning firm of Duany Plater-Zyberk, Nancy Stroud of the law firm of Lewis, Stroud & Deutsch, PL, and a dedicated staff of city planners headed by the Planning Director Ana Gelabert-Sanchez.

[24] *See* The Local Government Comprehensive Planning and Land Development Regulation Act, Sections 163.3184 et seq., Fla. Stat. (2009).

[25] See Section 2 of this paper.

[26] Bert J. Harris, Jr., Private Property Rights Protection Act, § 70.001 et seq., Florida Statutes (2009); Stroud & Wright, *Florida's Private Property Rights Act: What Will It Mean for Florida's Future?,* 20 Nova L. Rev. 683 (1996).

of uses was generally expanded, except for the established single family neighborhoods. The mix of uses was also greatly simplified by consolidating the several hundred existing separately defined and regulated uses into broader categories of use.

This approach to development rights disappointed many in the community who wished to see downzoning in certain areas, such as the commercial corridors next to residential neighborhoods. In the political process of adoption hearings, the city heard from both sides – property owners who advocated increased development capacity, and activists who advocated for downzonings – and have made adjustments that may yet prove to create challenges under the Act.

A further concern has been for the treatment of property that, upon passage of the Miami21 Code, that will become nonconforming. Like many old zoning codes, the archaic nonconformity provisions of the existing code were not understandable to the layperson and needed to be rewritten for simplicity. Additionally, the threat of damage by hurricanes and other Acts of God, and the fear that new standards mean a significant increase in nonconformities created an outcry resulting in the liberalization of existing nonconformity rules in favor of the property owner. In a related matter, the Code needed to address how to treat development permits currently being processed or that had already issued. The City had determined early in the process not to enact a moratorium on new applications pending the revisions to the Code, and indeed at that time was experiencing a tremendous boom in permitting and construction. As a result, the new Code has fairly liberalized provisions for time extensions and vesting.

The drafters of the Code took the opportunity to simply the existing processes of the existing code, such as consolidating the existing planning board and the zoning board into one board. Public notice, appeal procedures and the like were standardized and new quasi-judicial procedures included. The Miami 21 code incorporated into the regulations a number of overlay regulations and special districts established under the old code, eliminating a plethora of confusing multiple overlapping regulations. Although new names for different types of permits were created (under the language of the Smart Code "waivers, exceptions and warrants"), the Miami21 Code incorporated the procedural protections of existing processes where appropriate.

These legal issues required adjustments to the model Smart Code to recognize community understandings and values which are necessary in any major rewrite of a zoning code. The choice in Miami has been to pursue a "hybrid" form-based code in recognition of the reality that the city is more than a hundred years old with a built-out, existing fabric that deserves respect and, in many cases, protection. The Miami21 Code allows the city to grow into the next century with due regard for its history.

5. Conclusion

For years, city attorneys have been called on to deal with problems related to the inflexibility of traditional zoning ordinances. A number of very useful flexible zoning tools have emerged from efforts to amend zoning codes to allow development that makes sense. In that same vein, the form based code offers a new comprehensive approach to addressing the growing criticisms with respect to the type of development that zoning has produced. Given their newness, those who seek to draft form based regulations for their communities should be prepared for the types of legal challenges that may follow as courts are asked to review these codes.