Philadelphia's Ever Evolving Zoning Code



Kristin K. Bray

Chief Deputy City Solicitor, Code Enforcement Unit

City of Philadelphia, Law Department

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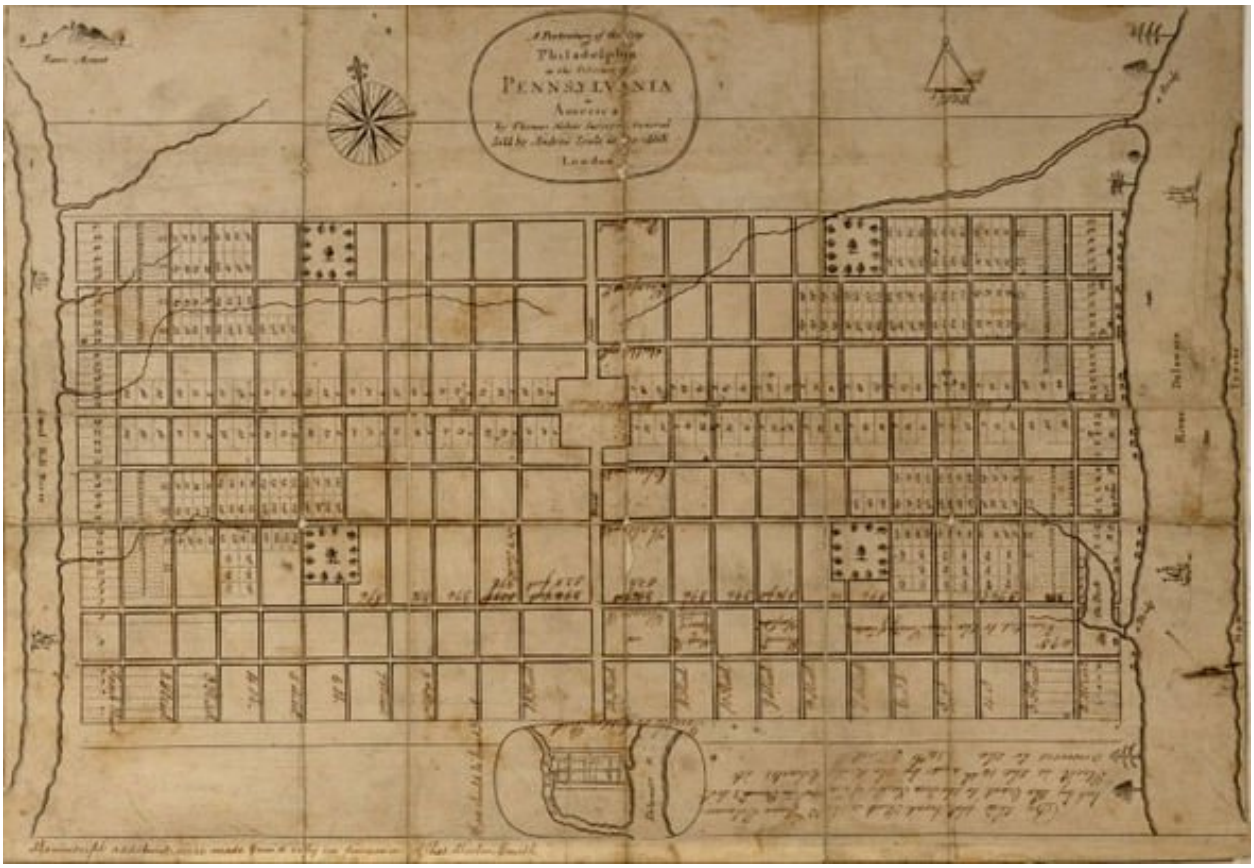
From its founding, Philadelphia has long had a long history of zoning and land use regulation. From its early days as one of the original thirteen colonies to the modern day, Philadelphia has used land use and zoning tools to regulate conduct, promote good land use practices, and encourage economic development.

Philadelphia's Historic Planning and Early Zoning

Early settlements in the United States tended to follow those of England, which were typically an "unplanned maze of old horse tracks and small holdings." Christopher Munden, *The Stories Behind Philly's Squares*, (April 23, 2015, updated August 23, 2017) https://www.wheretraveler.com/philadelphia/play/stories-behind-phillys-squares. In 1681, to settle outstanding debts, King Charles II granted William Penn and his family a tract of land that eventually became portions of the Commonwealth of Pennsylvania and, in particular, the City of Philadelphia. *Id.*

To attract new residents to his new lands, in 1683, William Penn published a map, demonstrating the design of his new settlement. *Id.* That map was part of Penn's overall planning (and marketing) strategy in which he wanted to create a "Green Country Town." *Id.* To solve some of the ills of city living he had experienced in his youth (e.g.: outbreak of plague in 1665, massive fire in 1966), Penn's Green Country Town featured large spacious lots separated by wide streets designed on a grid-like pattern. Inga Saffron, *Philly's Love-Hate Relationship With Parks*, (May 7, 2011) http://www.philly.com/philly/blogs/inq_ed_board/Saffron-.html?arc404=true. Central to Penn's design was the inclusion of five

public squares, one in each quadrant of the City and one in the center.[1] Penn's original advertisement, from surveyor Thomas Holmes' *A Portraiture of the City of Philadelphia*, follows below:



Thomas Holmes' *A Portraiture of the City of Philadelphia*

Subsequently, although Philadelphia lacked a planning Code for the next hundred years, City planning and development was largely driven by public need and/or development pressures. For example in the mid-19th century, Philadelphia began to acquire large swaths of land that eventually became the largest municipal parks in the world: Fairmount Park. Such lands were to acquired to protect public water systems from dumping and pollution. Inga Saffron, *Philly's Love-Hate*

[1] These square still exist in the City of Philadelphia today with the central square being where City Hall is located. The remaining squares are public squares with artwork, parks, and public events are held throughout the year. Today they are known as Rittenhouse Square (Southwest Square); Washington Square (Southeast Square); Logan Circle (Northwest Square); Franklin Square (Northeast square). For a better description of the current squares, see Christopher Munden, *The Stories Behind Philly's Squares*, (April 23, 2015, updated August 23, 2017) https://www.wheretraveler.com/philadelphia/play/stories-behind-phillys-squares.

Relationship With Parks, (May 7, 2011) http://www.philly.com/philly/blogs/inq_ed_board/Saffron-.html?arc404=true.

Early in the 20th century, municipalities begin to turn to the use of zoning as an attempt to allow local municipalities to regulate land use. Zoning was seen as being the marriage of Progressive era good government ideals with conservative efforts to protect the interest of upper classes and business owners. Jake Blumgart, Zoning (Philadelphia), (last visited October 17, 2018) https://philadelphiaencyclopedia.org/archive/zoning-philadelphia/. While West coast cites were the first to employ some local land use regulatory controls, it was New York City that enacted the first comprehensive local zoning code in 1916. *Zoning Variances and Exceptions: The Philadelphia Experience*, University of Pennsylvania Law Review, vol. 103, no. 4, 1955 p. 516. Other cities followed suit which resulted in subsequent legal challenges to the constitutionality of the government's actions.

In 1926, in the landmark decision of *Village of Euclid, Ohio v. Ambler Realty Co.*, the United States Supreme Court rejected a constitutional challenge to the municipality's use of zoning to regulate certain uses within its jurisdiction. 272 U.S. 365 (1926). Specifically, the Supreme Court held that "before[a zoning] ordinance can be declared unconstitutional, [a challenger must establish] that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id*. At 395. Thus, the local government's authority to regulate zoning was largely upheld as a valid use of police powers.

Zoning versus Land Use

It is important to distinguish between land use and zoning. Land use refers to the broad types of uses that are available within any particular district such as residential, commercial, and industrial. These broad land use categories may then be broken down into smaller sub-categories such as high-density residential or commercial office space or warehouse distribution. Land use determinations are

often reflected in City planning maps which identify potential uses that, if developed, could enhance quality of life or economic development in the area.

In comparison, zoning is the regulatory tool that the government. Thus, it is influenced by the land use determinations made by city planners. Zoning regulates which particular uses can be placed in any one area, the height of the structures, where a structure can be located on a lot, the density of use, amongst other matters. In general, zoning is a police powers, regulatory tool to keep "incompatible uses" from being next to each other.

Zoning Models

Although most people think of zoning in terms of the comprehensive code structure that was upheld in *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926), municipalities are starting to employ different, more flexible zoning models that are responsive to the needs of planners, developers, and the public. Below are highlighted five different zoning models and their strengths and weaknesses.

The comprehensive zoning model that the Supreme Court upheld in *Village of Euclid* has come to be known as Euclidean zoning. Euclidean zoning regulates development through land use classifications and dimensional standards. Typical land use classifications found in Euclidean zoning models are single-family residential, commercial, industrial. Euclidean zoning also employs dimensional standards which can regulate issues such as setbacks, side-yards, height limits, minimum lot sizes, and lot coverage limits. The planning goal of Euclidean zoning is to prevent overcrowding of land and people, alleviate congestion, and separate incompatible uses. Euclidean zoning has been criticized as being inflexible and an out-dated zoning model. However, municipalities often like Euclidean zoning models because it is very easy to manage and regulate.

Another zoning model that has come to be employed by certain municipalities are Form-Based codes. Form-Based code zoning emphasizes regulating the scale and form of buildings and their placement along and within

public spaces (including sidewalks, street trees, and street furniture). It also regulates the form and mass of buildings in relationship to another and the scale and types of streets and blocks. The focus of Form-Based codes centers on the character of the neighborhood as being the deciding factor. The planning goal of Form-Based code zoning is to curb urban sprawl, promote pedestrian safety, and preserve the fabric of historic neighborhoods. Form-Based codes have been criticized, however, for never having been tested in any large, old, industrial cities.

Yet another zoning model is Incentive based zoning. Incentive based zoning "rewards" the developer with something "extra" by providing the developer with something the developer wants in exchange for the developer funding some project that is in the community's best interest. An example of Incentive based zoning would be a code that allows higher density or larger buildings than currently are allowed under existing codes in exchange for the developer providing something of value to the community such as urban design (e.g.: public art), human services (e.g. affordable housing) or public transportation access. More municipalities are embracing Incentive based zoning as it promotes equity and social justice issues while simultaneously attracting developers due to its greater flexibility. However, Incentive based zoning projects can be complex to for municipalities to administer and difficult to enforce.

A fourth zoning model is known as Performance Based Zoning. In general, Performance Based Zoning regulates the effect of or impact of land use. Typical subjects that are regulated under such a scheme would include concerns over traffic flow, density, noise and access to light and air. Under such schemes, developers can build nearly anything that meets performance based standards for the district. While Performance Based Zoning allows great flexibility for developers, it is incredibly difficult for municipalities to administer and enforce. To that end, such

performance measures might be better regulated through code enforcement schemes.[2]

A fifth and final model for zoning regulation is known as Modular zoning which breaks up zoning districts into fundamental building blocks and then allows these components to be broken up in different ways to fit the development project. As an example of this scheme, a property could be designated as "R-B-3." In this example, the designation of "R" would designate the property as residential, the "B" would define the parking and design elements that must be included in the project, and the "3" would designate the height of three stories. If the owner of the property only had one issue with that designation — such as the parking — then any appeal would need to be lodged on that limited issue. While such models have great flexibility, they can be complicated to administer.

Philadelphia's Zoning Code and Its Revisions

Philadelphia adopted its first comprehensive zoning code in 1933. Because Philadelphia was not yet a Home Rule municipality,[3] Philadelphia had to rely upon the state enabling act, which authorized cities of the first class to draft and enforce zoning ordinances. Act of May 6, 1929, P.L. 1551. Pursuant to that state enabling act, Philadelphia drafted its first comprehensive zoning scheme.

The 1933 Philadelphia Zoning Code largely reflected how the City looked at the time. In a rather Progressive turn, the City widely allowed multi-family use; such a strategy should be contrasted with suburban communities that excluded multi-family uses within their communities. In total, in 1933 Philadelphia had 13

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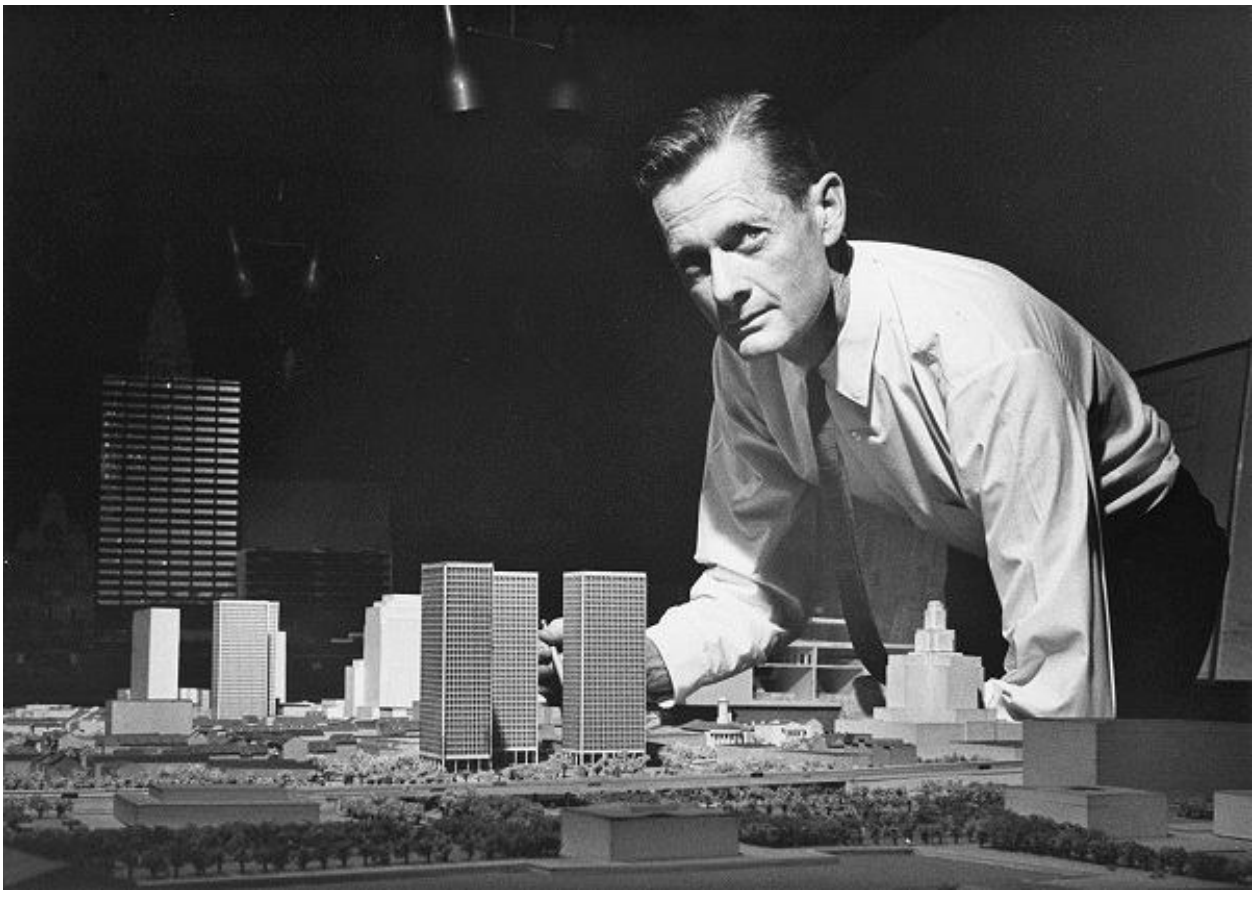
[2] An example of such a scheme would be Philadelphia's Window and Doors program which attempts to minimize the blighting effect of vacant buildings within an occupied neighborhood by requiring those vacant structures to maintain windows and doors. The program is regulated through Philadelphia's Property Maintenance Code rather than its Zoning Code. The program has also been credited with revitalizing the City's neighborhoods and decreasing crime. *See* Eric Klineberg, *The Other Side of "Broken Windows" (August 23, 2018)* https://www.newyorker.com/books/page-turner/the-other-side-of-broken-windows.

[3] Philadelphia became the first home rule municipality in Pennsylvania in 1951.

zoning classifications (7 residential, 4 commercial, and 2 industrial); specific uses for parcels were reflected on a mere 27 maps.

Because the 1933 Code largely reflected the current layout of the City, many of the initial legal challenges attempted to resolve the nature of breadth of the regulatory scheme. For example, early challenges had to resolve the issue of whether a variance applied to the single plot of land that was before the Zoning Board of Adjustment or the mapped area entirely. Other challenged largely resolved whether uses were non-conforming.

By 1942 the City of Philadelphia had established the Planning Commission. One of its early directors was noted urban planner, architect, educator, and author



Edmund Bacon overlooking the design of the City of Philadelphia.

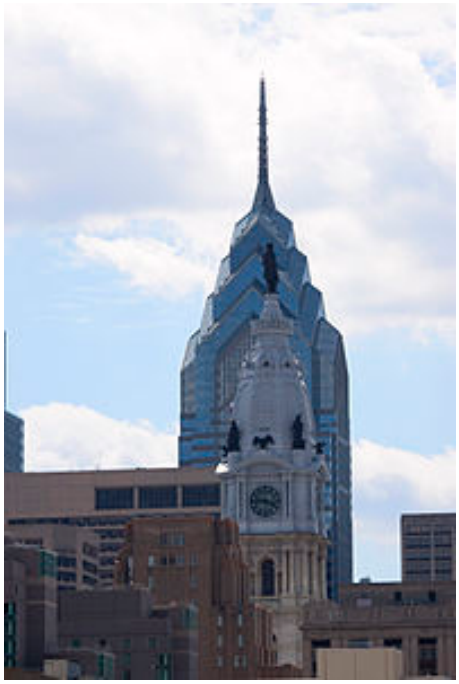
Edmund N. Bacon. Mr. Bacon served as the director of the Planning Commission from 1949-1970 and is often referred to as "The Father of Modern Philadelphia" as his vision shaped the city Philadelphia is today. Christopher Pierznik, *The Father of Modern Philadelphia: Edmund Bacon and the (un)making of a city*, (February 13, 2015) https://medium.com/@pierzy/the-father-of-modern-philadelphia-cc2373717a45. During his tenure, it was becoming apparent that the City needed to re-write its 1933 zoning code as the Zoning Board of Adjustment was becoming swamped with variance requests. With only two zoning code officials to investigate all such claims, the Code, as it existed, was nearly impossible to manage. Jake Blumgart, Zoning (Philadelphia), (last visited October 17, 2018) https://philadelphiaencyclopedia.org/archive/zoning-philadelphia/.

Accordingly, as a part of other reforms, including adopting the first Home Rule charter in the Commonwealth, in 1962, the City undertook re-writing its zoning code and re-writing its maps in 1965. As a result of this re-write, the new zoning code included 43 zoning classifications, which represented 23 residential uses, 8 commercial uses, 8 industrial uses, and 4 "special uses." In anticipation of a City that would continue to grow in population and industrial uses, the City continued to allow multi-family use and developed planning goals to allow industrial use to continue to grow and expand. Unfortunately, this vision did not come to fruition as, following the adoption of the revised zoning code, the City's population and industrial base immediately drifted downward. Jake Blumgart, Zoning (Philadelphia), (last visited October 17, 2018) https://philadelphiaencyclopedia.org/archive/zoning-philadelphia/.

For the next two decades, City development revolved around a zoning code that failed to account for the population and industrial decline that the City experienced throughout the late 1960s, the 1970s, and the 1980s. In addition, City planners and civic leaders, largely influenced by City Planning Director Edmund Bacon, entered into a "gentlemen's agreement" which restricted building heights to not rising above the height of the William Penn statue, which sat atop the highest point of City Hall. Christopher Pierznik, *The Father of Modern Philadelphia: Edmund Bacon and the (un)making of a city*, (February 13, 2015) https://medium.com/

@pierzy/the-father-of-modern-philadelphia-cc2373717a45. Consequently, no buildings taller than 548 feet were built within the City for the next few decades. *Id*.

That all changed when, in 1984, Willard Rouse, a Philadelphia developer, built Liberty Place, a complex with two skyscrapers that towered over William Penn on City Hall, standing at 945 feet and 848 feet, respectively. *Liberty Place*, (last visited October 18, 2018) https://en.wikipedia.org/wiki/Liberty_Place.



Liberty Place in relationship to William Penn on City Hall

Although public outcry ensued,[4] there was nothing within the zoning code that prohibited such a structure. Two things resulted from this public debate: Liberty Place was built and in 1988 the City revised the zoning code provisions related to the Center City district to allow for skyscraper development.[5]

This 1988 revision of the zoning code, which allowed for greater development within Center City, is largely credited with the revitalization of the Philadelphia's downtown that started in the late 1980s and continues through today. Jake Blumgart, Zoning (Philadelphia), (last visited October 17, 2018) https://philadelphiaencyclopedia.org/archive/zoning-philadelphia/.

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[4] Former City Planning Chairman Edmund Bacon was quoted as stating, "Once [the height ceiling is] smashed, it's gone." Then City Planning Chairman Graham S. Finney opposed the project expressing the view that the sky was public space that should be preserved from private development. *Liberty Place*, (last visited October 18, 2018) https://en.wikipedia.org/wiki/Liberty_Place

[5] Some would argue that the construction of Liberty Place also resulted in "Billy Penn's curse." https://en.wikipedia.org/wiki/Curse_of_Billy_Penn.

Although the zoning code was revised for the Center City district, the remainder of the City's zoning code had not been updated, which led to increasing reliance on the Zoning Board of Adjustment for variances. This, of course, led to some interesting results: for example, the Zoning Board of Adjustment was called upon to grant a variance for a pasta factory; it did, but on the condition that the pasta factory could only make rigatoni, ravioli, and spaghetti — but not angel hair pasta. Jake Blumgart, Zoning (Philadelphia), (last visited October 17, 2018) https://philadelphiaencyclopedia.org/archive/zoning-philadelphia/.

Similarly, crafty politicians and developers started to place spot zoning ordinances into the Philadelphia Code. "Spot zoning is the 'unreasonable or arbitrary classification of a small parcel of land, dissected or set apart from surrounding properties, with no reasonable basis for the differential zoning.'" *Atheron Development Co. v. Twp. of Ferguson*, 29 A.3d 1197, 1204 (Pa. Cmwlth. 2011) (quoting *BPG Real Estate Investors–Straw Party II, L.P. v. Bd. of Supervisors of Newton Twp., Delaware Cnty.*, 990 A.2d 140, 150 (Pa. Cmwlth. 2010). In other words, it is impermissible because "zoning, to be valid, must be in accordance with a rational and well considered approach to promoting safety, health and morals and a coordinated development of the whole municipality." *Twp. of Plymouth v. Cnty. of Montgomery*, 531 A.2d 49, 57 (Pa. Cmwlth. 1987). Further, spot zoning ultimately defeats City planners goals for a comprehensive plan for the City.

By the beginning of the 21st Century it was clear that Philadelphia's Zoning Code, which had grown to an unwieldy document after 40 years of spot zoning and a lack of a comprehensive plan, needed to be revised.

The City Modernizes Its Zoning Code

In 2007, the City undertook its first major re-write of the entire zoning code. To initiate the process, the City first had to get voter approval for a charter change that would result in the creation of the Zoning Code Commission ("ZCC"); the voters overwhelmingly approved this charter change. Once appointed, the ZCC's overall mission was ambitious: re-write the City's antiquated zoning code while

taking into account public input. After four years of public input and debate, a new zoning code was signed into law on December 22, 2011 and took effect on August 22, 2012. *See*, *generally*, Title 14 of the Philadelphia Code of Ordinances.

The new code divided the City into a total of nineteen different use groups: five residential; three commercial; two mixed use (industrial/residential and industrial/commercial); four industrial; and five special purpose. City of Philadelphia Planning Commission, *Zoning Matters* (last visited October 18, 2018) https://www.phila.gov/CityPlanning/projectreviews/PDF/Zoning_Matters_website_CONTENT.pdf. The first re-write in fifty years had some ambitious goals: 1) create better organization/ability to navigate the Code; 2) make construction/development more predictable and require less relief from the ZBA; 3) encourage high quality positive development while simultaneously encouraging investment and jobs; 4) preserve the character of Philadelphia's neighborhoods and open space; and 5) involve the public in development decisions in their communities. *Id.*

Having implemented the new Code, the City committed to ensuring that the changes met the initial planning goals, the process met the City's growing needs, and otherwise was improving the City's zoning process. To that end, the City implemented constant reviews and studies of the new zoning Code. *Id.* Those studies revealed interesting results. At one year, public input revealed that citizens, developers, and attorneys found the new Code easier to use and allowed for greater community involvement. *Id.* More positively, the City saw requests for variances drop from 18% to 13%. *Id.* The changes to the Code also saw additional sustainability projects being developed throughout the City as those projects were incentivized under the Code. *Id.* Further, in general, individuals reported that the new Code allowed greater flexibility and seemed to be responsive to development concerns. *Id.*

On a five year review of the new Code changes, completed in August 2017, the City continued to see positive change but also began to identify opportunities for improvement. Users continued to agree that the revised Code is "easier to

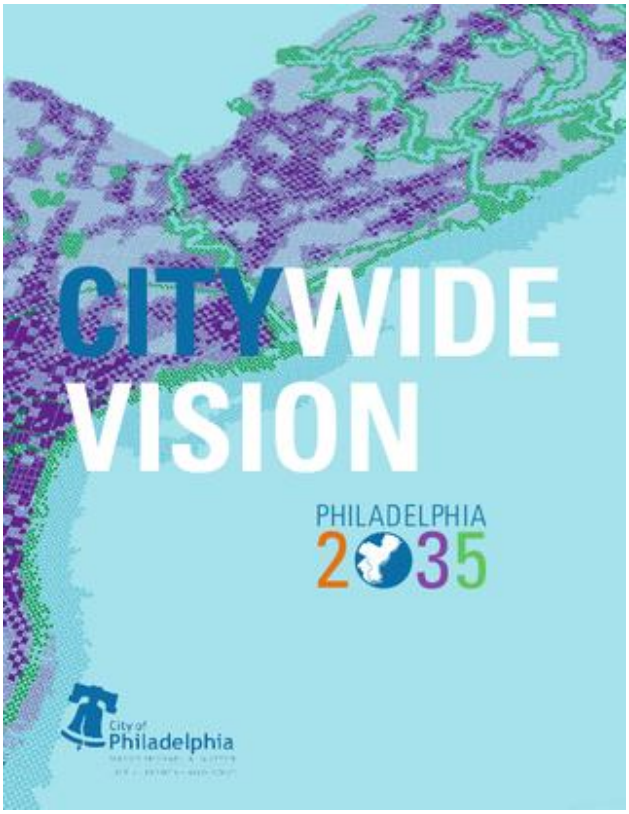
understand and provides better consistency." *Id.* There was also a 6% increase in permits approved by-right, increasing the total by-right permits issued by the City from 66% to 72%. *Id.* Further, while the number of zoning permit applications increased, the number of appeals filed with the Zoning Board of Adjustment decreased during that same time period. *Id.*

However, despite these significant changes, there has only been a slight decrease in the number of appeals that have been denied by the Zoning Board. Prior to the revisions, appeals were denied 10% of the time; the most recent statistics on denials indicate that appeals are now being denied 13% of the time. *Id.* This minor increase has led to questions as to whether the Zoning Board of Adjustment's somewhat routine granting of variances undermines the planning goals of the City as set by the Planning Commission. *See*, *e.g.*, Inga Saffron, *Philadelphia Expected the Rail Park to Generate New Development. Instead, We Might Get a Self-Storage Facility* (October 18, 2018) http://www2.philly.com/philly/columnists/inga_saffron/philadelphia-self-storage-density-zoning-board-michael-grasso-planning-commission-20181018.html.

Next Steps

In general, the consensus in Philadelphia remains that the Zoning Code is a living document that needs to be updated and maintained regularly. To that end, the City employs a Zoning Technical Committee ("ZTC") that regularly meets to discuss issues under the Code. The City's ZTC is composed of experts in the field and includes representatives from the Planning Department, the Department of Licenses and Inspections, and Law Department, amongst others. Each of these individuals bring their expertise on matters that need to be revised under the Code and make recommendations on legislative changes as issues arise. This real-time response allows the Code to remain modern, responsive, and flexible to changing City and development needs.

To that end, the ZTC has addressed issues that have arisen under the Zoning Code in the past five years. For example, the revised Code employed additional set-



back requirements to promote open space within the City. Unfortunately, these good intentions led to a significant increase in the number of requests for dimensional variances. In response to the increase in dimensional variance requests, the ZTC immediately analyzed the root causes for the rise in dimensional variance requests and suggest immediate Code changes.

Likewise, the new Code allowed community involvement through Registered Community Organizations. While this was generally a positive change (because it allowed developers to resolve minor issues with the community and, therefore, decreased challenges at the Zoning Board of Adjustment), some Registered Community Organizations engaged in less-than desirable behavior. Because of the ZTC, however, the City was able to address these issues in real-time and propose codes of conduct and other standards that could be easily adopted.

The ZTC is likewise able to propose strategies and address issues as they arise. This flexibility and responsiveness has been extremely helpful when the City has been asked to address developing equity issues such as open space, historic preservation, trends in sustainable design, transit-oriented development and affordable housing. Further, the ZTC is able to address zoning issues that are impacted by trending topics like medical marijuana facilities or safe-injection sites and propose solutions to government and civic leaders as they grapple with appropriate policy or legislative changes.

Moreover, with an eye toward the future, Philadelphia has created a City-wide vision for 2035. By establishing planning goals years in advance, government leaders are able to make smart decisions about what their City should look like and plan the steps to get there. By committing to these land use goals, City and civic leaders are able to encourage future growth, attract business, and attract positive development within the City. Such goals also establish the City's commitment to equity goals, inclusive of developing more opportunities for affordable housing and increasing sustainable, transit-oriented development.

Zoning codes, no matter what the model must be responsive and flexible to the ever evolving needs of the community. Municipalities are constantly growing and changing. To ensure that all stakeholders — be they developers or community members — needs are being met, a municipality would be best positioned if it employs practices that permits its Code to be flexible, responsive, and meet changing community needs.