

Form-Based Land Development Regulations

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I. Introduction

RECENTLY, SEVERAL COMMUNITIES—among them Contra Costa County, California; Arlington County, Virginia; Petaluma, California; Hercules, California; Kendall, Florida; and Azusa, California—have put into place the latest iteration of new urbanist-influenced land development regulations: “form-based codes.” The form-based approach to new urbanist land use regulation¹ has, up until recently, been applied mainly in private-covenanted regimes—Kentlands, Seaside, and their progeny—a legal atmosphere quite different from the public regulatory sphere. This moving along the continuum from private to public, of course, starts to reveal the legal issues attendant to these types of regulations. This article serves as an introduction to form-based codes for lawyers, and presents three primary legal issues that arise when local governments begin to enact these design-based land use regulatory tools.

II. What Is a Form-Based Land Development Regulation?

A form-based code is “a land development regulatory tool that places primary emphasis on the physical form of the built environment with the end goal of producing a specific type of ‘place’.”² Standing in con-

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1. See, e.g., AM. PLANNING ASS'N PLANNING ADVISORY SERV., THE ESSENTIAL PAS INFO PACKET—FORM-BASED ZONING (April 2004); CONGRESS FOR THE NEW URBANISM, CODIFYING NEW URBANISM: HOW TO REFORM MUNICIPAL LAND DEVELOPMENT REGULATIONS (2004); Brian W. Ohm & Robert Sitkowski, *The Influence of New Urbanism on Local Ordinances: The Twilight of Zoning?*, 35 URB. LAW. 783 (2003); Kaizer Rangwala, *Form-Based Code: The Farmers Branch Experience*, PRACTICING PLANNER (Fall 2005); Scot Siegal, *Form-Based Codes: Where Do We Go from Here?*, PRACTICING PLANNER (Fall 2005); Bob Sperber, *Function Follows Form*, PROF. BUILDER (Sept. 2005); Jerry Weitz, *Form-Based Codes: A Supportive But Critical Perspective*, PRACTICING PLANNER (Fall 2005).

2. City of Farmers Branch, Codes Project: Frequently Asked Questions, <http://www.farmersbranch.info/Planning/codes7FAQs.html> (last visited Nov. 21, 2005).

trast to conventional land development regulations (which, it is argued, favor regulating use over form), form-based regulations are designed to place the ultimate form of the development in a superior position to the use to which the property is put. As explained further by planner Paul Crawford, of Crawford Multari & Clark Associates, and a member of the newly constituted Form Based Codes Institute,³ form-based regulations are:

Municipal development regulations that go beyond the conventional zoning controls of segregating and regulating land use types and defining building envelopes by setback requirements and height limits. Form-based codes instead address the details of relationships between buildings and the public realm of the street, the form and mass of buildings in relation to one another, and the scale and type of streets and blocks. Form-based codes are based on specific urban design outcomes desired by the community, that may be identified through an inclusive, design-focused public participation process. The regulations in form-based codes are applied to property through “regulating plans” that map the community with geographic designations that are based on the scale, character, intensity, and form of development rather than differences in land uses.⁴

Although form-based regulations, by their nature, are designed to be place-specific, they have a readily identifiable set of component parts—the elements of a form-based land development regulation⁵:

- *The Regulating Plan.* A “key map,” akin to but very different from a zoning map, showing the sites for various buildings, street types, build-to lines, and, in some cases, design features.
- *Urban Regulations.* These regulations are commonly presented in the form of a matrix with supporting diagrams covering bulk, height, coverage, and “in-building” use standards, and are generally recognizable as such as they are presented in conventional land development regulations. These standards are organized by building type—rather than land-use type—categories.
- *Street Regulations.* These regulations present, in a graphical form, the width and dimensions of streets, sidewalks, paths, curb heights, street-side parking requirements, allowable turning radii, and other standards applicable to streets. It is an open question whether these standards should be included in the “zoning” regulations in juris-

3. For more information on this organization, see its website at <http://www.formbasedcodes.org> (last visited Nov. 21, 2005).

4. E-mail from Paul Crawford to Robert Sitkowski (on file with author).

5. This list of elements was derived from Peter Katz, *Form First*, PLAN., Nov. 2004, at 17; Jeremy E. Sharp, An Examination of the Form-Based Code and Its Application to the Town of Blacksburg (Nov. 4, 2004) (unpublished major paper), available at http://scholar.lib.vt.edu/theses/available/etd-12172004-140622/unrestricted/Sharp_FINALmajorpaper.pdf (last visited Nov. 21, 2005).

dictions that have a bifurcated zoning/subdivision scheme rather than a unified development ordinance approach.

- *Landscape Regulations*. These provisions govern permitted species, sizes, and locations of trees and other plantings.
- *Architectural Regulations*. These necessarily diagrammatic and graphical regulations govern the building styles, details, and materials that are permitted and the ways in which they can be incorporated into various building elements such as walls, windows, fences, and roofs.

Not every set of form-based land development regulations includes all five of these sections, and some elect not to include the architectural regulations based on the argument that they are the most objectionable from a legal standpoint.

III. The Legal Issues

Because this article presents a newly evolving type of regulation, it is beneficial and responsible to step back and look at fundamental legal principles that underpin how local land development regulations are enabled, written, and administered. This article addresses three of these: authorization (the manner in which these new types of regulations are enabled), discretion (the manner in which the regulations are written), and delegation (the manner in which the regulations are administered).

A. Authorization

It is appropriate to begin an examination of the legal considerations with the status of enabling legislation for regulations designed to promote “traditional neighborhood development” in general and form-based regulations specifically. As described in an earlier article,⁶ Pennsylvania and Wisconsin explicitly provide that local governments are enabled to promulgate “traditional neighborhood” regulations as part of their zoning powers, when the legislatures determined that express enabling legislation was required to prompt their local units of government to enact land development regulations that would promote new urbanist forms of development. In addition, the Connecticut legislature has promulgated a wide-ranging community character regulation, the “Village Districts Act,” that could be used to support the enactment of new urbanist-influenced land development regulations.⁷

6. See also Robert Sitkowski & Brian Ohm, *Enabling the New Urbanism*, 34 URB. LAW. 935 (2002).

7. CONN. GEN. STAT. § 8-2j (2004).

However, there has been one significant development in this realm of specific enabling legislation since that earlier article. On July 20, 2004, California Governor Arnold Schwarzenegger signed Assembly Bill No.1268, which expressly authorizes form-based regulatory techniques. This law authorizes the text and diagrams in a general plan's land-use element that address the location and extent of land uses, and the zoning ordinances that implement these provisions, to express community intentions regarding urban form and design in the following way:

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.⁸

In states other than California, Pennsylvania, Wisconsin, and, perhaps, Connecticut, one might argue that a form-based approach might be difficult to implement in the short term since the primary legal problem with this approach is that most state enabling statutes take land *use*, and not *form* of development, as their touchstone. Accordingly, since many of the enabling statutes around the country are, in one form or another, still rooted in the 1926 Standard State Zoning Enabling Act (SSZEA) provisions, it is worth examining some of those provisions to see whether they support a form-based approach. Not surprisingly, they do.

The "Grant of Power" provisions in the SSZEA include the following:

- height, number of stories, and size;
- lot coverage;
- yards, courts, and other open spaces;
- density; and,
- location and use of structures and land.⁹

This list of the contours of the grant of power to local government explicitly considers form of development; i.e., coverage, setbacks, height, number of stories, density, and location of structures. It also authorizes regulation by use of structures and land, and describes use

8. CAL. GOV'T CODE § 65302.4 (2005).

9. ADVISORY COMM. ON ZONING, U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (1926), <http://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf>, at 4 (last visited Nov. 21, 2005).

in the broadest terms of commercial, residential, and industrial. The list does not preclude the consideration of form in local land regulation.

The “Purposes in View” provisions of the SSZEA include the following purposes of zoning regulation:

- that it be “In Accordance with a Comprehensive Plan”;
- lessen congestion in the streets;
- secure safety from fire, panic, and other dangers;
- promote health and general welfare;
- provide adequate light and air;
- prevent overcrowding of land;
- avoid undue concentration of population; and,
- facilitate adequate provision of public requirements.¹⁰

Again, none of these purposes of regulations limit the regulation to the use of land. In fact, one additional item in the SSZEA’s list of purposes puts a finer point on this issue: “Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the municipality.”¹¹

This provision appropriately balances the use of land and the form of development, i.e., character of the district. 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 the SSZEA-influenced states.¹² Additional support for form-based land development regulations may be found in other enabling laws, such as subdivision regulation enabling laws and architectural district enabling laws.

Also contrary to conventional belief, form-based land-use development regulations do not “toss out” uses as a means of regulation. By way of example, uses are presented in the Smart Code¹³ as “Building Function Standards.” The Smart Code is an extraordinarily ambitious

10. *Id.* at 6.

11. *Id.* at 7.

12. It should be noted, however, that the “Uniformity Clause” of the SSZEA may pose an implementation issue. *See, e.g.*, BRIAN W. BLAESSER, DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE OF DISCRETION § 8:43 (2005).

13. Duany Plater-Zyberk & Company, Smart Code, <http://www.dpz.com/pdf/SmartCodeV7.0-6-06-05.pdf> (last visited Nov. 21, 2005). Portions of the Smart Code have been adopted or are being considered for adoption in various locations around the country; *see also* PlaceMakers, <http://www.placemakers.com/info/SCdownloads.html> (last visited Nov. 21, 2005).

model form-based code promulgated by Duany Plater-Zyberk & Company that can also be considered a planning document presenting an alternative regulatory framework. The Smart Code is based on a physical organizing system described as “The Transect”—a continuum of human habitation from urban core to rural.¹⁴ The Building Function Standards are presented in a very simple table that is designed to be flexible, letting the market decide what goes on inside the building types. Local form-based codes cannot dispense with uses for another reason—overriding federal statutes such as the Fair Housing Amendments Act, the Telecommunications Act of 1996, and RLUIPA, which are explicitly use-based.

Form-based land development regulations, like all land-use regulations, must also satisfy the requirements of substantive due process. Since they are exercises of the police power, form-based land development regulations must advance legitimate governmental interests that serve the public health, safety, morals, and general welfare. A majority of jurisdictions in the United States now accept aesthetic considerations, either alone or in conjunction with other legitimate objectives, as a proper goal in the exercise of the state’s police power, which is critical in those cases where the local government seeks to operationalize the “Architectural Regulations” portion of a form-based land development regulation.¹⁵ A minority of the states recognizing aesthetics

14. See Andres Duany & Emily Talen, *Making the Good Easy: The Smart Code Alternative*, 29 *FORDHAM URB. L.J.* 1445 (2002); Andres Duany & Emily Talen, *Transect Planning*, 68 *J. AM. PLAN. ASS’N* 245 (Summer 2002); see also *J. URB. DESIGN (SPECIAL ISSUE)*, Oct. 2002 (containing seven papers examining applications of The Transect); Philip Langdon, *Zoning Reform Advances Against Sprawl and Inertia*, *NEW URB. NEWS*, Jan./Feb. 2003.

15. See e.g., Paul Weinberg, *Zoning for Aesthetics—Who Decides What Your House Will Look Like?*, 28 *ZONING & PLAN. L. REP.* (Oct. 2005); Lane Kendig, *Too Big, Boring or Ugly: Planning and Design Tools to Combat Monotony, the Too-Big House, and Teardowns*, *AM. PLAN. ASS’N PLAN. ADVISORY SERVICE REP.* (2004); Elizabeth A. Garvin & Glen S. LeRoy, *Design Guidelines: The Law of Aesthetic Controls*, 55 *LAND USE L. & ZONING DIG.* 3 (Apr. 2003); Julie A. Tappendorf, *Architectural Design Regulations: What Can a Municipality Do to Protect Against Unattractive, Inappropriate, and Just Plain Ugly Structures?*, 34 *URB. LAW.* 961 (2002); Lee R. Epstein, *Where the Yards Are Wide: Have Land Use Planning and Law Gone Astray?*, 21 *WM. & MARY ENVTL. & POL’Y REV.* 345 (1997); Douglas C. French, *Cities Without Soul: Standards for Architectural Controls with Growth Management Objectives*, 71 *U. DET. MERCY L. REV.* 267 (1994); Shawn G. Rice, *Zoning Law: Architectural Appearance Ordinances and the First Amendment*, 76 *MARQ. L. REV.* 439 (1993); James P. Karp, *The Evolving Meaning of Aesthetics in Land Use Regulation*, 15 *COLUM. J. ENVTL. L.* 307 (1990); Kenneth Regan, *You Can’t Build That Here: The Constitutionality of Aesthetic Zoning and Architectural Review*, 58 *FORDHAM L. REV.* 1013 (1990); Samuel C. Poole & Ilene Katz Kobert, *Architectural Appearance Review Regulations and the First Amendment: The Constitutionally Infirm “Excessive Difference” Test*, 12 *ZONING & PLAN. L. REP.* (Jan. 1989).

as a legitimate target of regulation abide by what is termed the “traditional view”: aesthetic considerations alone are not a sufficient justification for the exercise of the police power. In these “aesthetics-plus” jurisdictions, the courts might strike a regulation whose sole purpose is to protect aesthetic values, unless express enabling legislation exists.

Aesthetic regulations generally come in two varieties. “Anti-look-alike” regulations provide that a new building may not be too similar to existing dwellings in the area. Other regulations, on the other hand, provide that new buildings may not be too dissimilar from existing buildings, adopting a “look alike” requirement, a variant of the now-familiar “compatibility” standard. Both types of regulations have increasingly been upheld, with many cases citing the well-known U.S. Supreme Court pronouncement in *Berman v. Parker*¹⁶:

The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.¹⁷

Form-based land development regulations, though, create a wrinkle in the established “anti-look alike”/ “look-alike” continuum because the primary focus of the regulations is not on individual buildings, but on the “Public Realm,” the *tout ensemble* of the façades of “fabric” and “focus” buildings and the design of all manner of the public spaces in between. The Supreme Court’s decision in *City of Los Angeles v. Taxpayers for Vincent* cemented the Court’s view that aesthetics are a proper focus of governmental regulation, which could arguably support considerations of the design of the public realm.¹⁸

B. *The Discretion/Prescription Continuum*

Form-based land development regulations must also comport with the principles of procedural due process, i.e., they must contain sufficiently detailed and meaningful standards in order to alert applicants to what is expected of them while allowing sufficient discretion in the decision-making body to determine the approval of an application. Otherwise, these regulations may fall prey to the void for vagueness doctrine.

Most form-based “urban” regulations that are prescriptive can certainly survive this test, but the issue really presents itself in the architectural standards, which may be necessary in many cases to achieve

16. 348 U.S. 26 (1954).

17. *Id.* at 33.

18. *See* 466 U.S. 784 (1984).

the goal. Given the demands of some proponents for design specificity, especially in the architectural regulations, there is another problem. Highly detailed standards are not much of an administrative problem in the early new urbanist “codes” since they are overwhelmingly privately enforced. But the same standards, if contained in a duly adopted set of regulations, may be so detailed, in some extreme cases, to rise to the level of a prior restraint on expressive activity in derogation of the First Amendment to the U.S. Constitution. One way to avoid such problems may be to focus on the form-based regulation as a tool to shape public space rather than as a “mere” architectural design regulation. After all, one could argue, government has a duty to promote and maintain a healthy and safe public realm.¹⁹

Given this choice between discretion and prescription, many localities have tried to land somewhere in the middle by using a “Design Guidelines” regime. While some governments have created sufficiently detailed guidelines for their historic districts, neighborhood conservation districts, or gateway/main streets, many others have tried to address design issues without the requisite discipline. Design guidelines established in the latter manner often have several problems, which are neatly summed up in the following observation: “Design Guidelines can prove to be a legal minefield. Guidelines are a combination of law and design administered by committee and applied to a property owner seeking development approval. The number of imaginable problems with this scenario is immeasurable.”²⁰

Problems can arise when the guidelines are vaguely described and there is a delegation of authority to bodies to make decisions on nothing more than the board members’ subjective tastes. Also, when design guidelines are advisory only, there is a tendency to not take them seriously, or, at best, to not know how they are to govern a particular proposal. Accordingly, the courts may have a hard time grappling with this middle ground “solution.”²¹

While prescriptive architectural standards in a form-based regulation are not without their problems in built areas,²² such standards may be

19. BLAESSER, *supra* note 12, § 8:50 (examines issues related in determining the areas to which the public realm might apply).

20. Garvin & LeRoy, *supra* note 15, at 6.

21. *See* Anderson v. Issaquah, 851 P.2d 744, 752 (Wash. Ct. App. 1993) (vague design standards unconstitutional). *But see* Novi v. City of Pacifica, 215 Cal. Rptr. 439, 441 (Cal. Ct. App. 1985) (some vagueness inherent and acceptable in design standards).

22. *See* BLAESSER, *supra* note 12, § 8:48–49; *see also* JONATHAN BARNETT & BRIAN BLAESSER, DEFENSIBLE DESIGN REVIEW: DESIGNING NEW AND RESHAPING EXISTING PATTERNS OF DEVELOPMENT (AICP Training CD-ROM, 2003).

necessary from a legal standpoint given the void for vagueness doctrine. The resistance to prescriptive design regulations seems to be less legal than practical and political.

C. *Delegation*

The final fundamental legal principle is delegation. Consideration must be given to the administrative body tasked with evaluating specific proposals made under the land development regulations given that, in virtually all circumstances, a form-based regulation will not have been seen, let alone administered, by local government staff. It is naïve to argue that, if the regulations are extraordinarily prescriptive, they are self-implementing in the local government context. Somebody in local government still needs to administer and interpret the regulations.

Given the design orientation of form-based regulations, the body logically best equipped to review and make substantive decisions in applications would be an Architectural Review Board. These bodies, however, have been assailed as mere “pretty committees.” Thus, they may have their own problems with enabling, and raise the specter of abuses of discretion given the subjectivity inherent in administering any type of design-based regulation.

One way this issue has been handled has been the creation of the position of “Town Architect.” This local government employee, be it in-house or hired as an outside consultant, serves a gate-keeping function as a person familiar with new urbanist design and form-based regulations who reviews applications and makes reports to the decision-making bodies. The legal issue with this position is how much decision-making authority can be delegated to this person—the Town Architect, while critical to the application review process, cannot be so powerful as to amount to a proxy for the decision-making body.

IV. Conclusion

Form-based land development regulations present the most recent evolution of new urbanist codes. They are another tool available to local governments to use in implementing New Urbanism objectives. While the article describes three principal legal issues associated with form-based land development regulations that must be considered, there are also three practical implementation issues. First, the fact that these regulations have their root in private-covenanted regimes may create friction as legal constraints are raised that were not experienced before. Second, the application of form-based land development regulations to the built condition raises issues of nonconformities and vested rights,

especially in the context of architectural regulations. Finally, the determination must be made of the appropriate balance between the degree of prescription required to create the desired physical result and the amount of discretion necessary to find solutions to problems that could not be anticipated when the regulations were drafted.