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Permit/Fees—County board charges developer unlawful building permit fees

Developer seeks restitution, but board argues voluntary payment defeats claim for return

Citation: *D.R. Horton, Inc. v. Board of Sup'rs for County of Warren, 737 S.E.2d 886 (Va. 2013)*

VIRGINA (02/28/13)—This case addressed the issue of whether certain building permit fees paid to the county, which were later found to be unlawful,

Contributors

Corey E. Burnham-Howard

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were nonetheless paid "voluntarily" and were not reimbursable under the common law voluntary payment doctrine.

The Background/Facts: Blue Ridge Shadows, LLC ("BRS") owned a tract of land in Warren County (the "Property"). At BRS' request, the Board of Supervisors for Warren County (the "Board") rezoned the Property from agricultural to suburban residential. As part of the rezoning process, BRS made a number of written "proffers" to the Board as inducements for the right to develop the property as a subdivision containing up to 225 residential units. The Board ultimately accepted BRS's "Revised Rezoning Request Proffer" (the "Revised Proffer"), in conjunction with approving BRS's rezoning application. In the Revised Proffer, BRS proposed, among other things, to construct and operate a centrally located wastewater treatment plant and water system to service the residential units within the development. BRS also proposed to "make cash payments in the total amount of $8,000.00 per residential unit" payable each time Warren County (the "County") issued a building permit for one of the units.

Subsequent to the Revised Proffer, BRS proposed: (1) that the Board allow BRS to hook-up to the Town of Front Royal's (the "Town") water and sewer services in lieu of BRS constructing the proposed water and sewer systems; and (2) that, in exchange, BRS would pay to the County an additional "hook-up fee" in the amount of $4,000 for "each residential water/sewer hookup obtained" from the Town. The parties never executed an agreement regarding this proposal. The Board, however, voted to allow the development to connect to the Town's water and sewer systems. The Board also voted to amend BRS's Revised Proffer to the County by deleting BRS's obligation to construct such systems for the development.

Eventually, D.R. Horton, Inc. ("Horton") purchased the Property from BRS. Horton purchased the Property subject to BRS's Revised Proffer, as amended by the deleted obligation to construct the water and sewer systems.

Between May 2006 and January 2010, the County issued to Horton a total of 52 building permits. For each permit, Horton paid to the County a "proffer fee" of $12,000, amounting to $4,000 more than the $8,000 fee set forth in the Revised Proffer. Horton paid the additional $4,000 fee under protest, stating: it did not believe it was obligated to pay the fee pursuant to the terms of the Revised Proffer; that it would pay the fee "until this matter has been resolved" in order "to avoid further damage to [Horton]"; and that it was paying the fee "only under protest and with a full reservation of its rights and remedies."

In 2007, Horton obtained a declaratory court judgment, which held that Horton was not obligated to pay the $4,000 "hook-up" fees to the Town.

In 2008, Horton sued the Board, seeking reimbursement of $104,000—constituting the total in $4,000 fees paid on its first 26 building permits.

As an affirmative defense, the Board raised the voluntary payment doctrine.

The voluntary payment doctrine, as established under Virginia common law, provides that:

> Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, [i] without an immediate and urgent necessity therefor, or [ii] unless to release his person or property from detention, or [iii] to

> prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back. And the fact that the party at the time of making the payment, files a written protest, does not make the payment involuntary.

The court agreed with the Board. It held that Horton was barred from being awarded reimbursement of the unlawful fees because it paid them "voluntarily" within the meaning of the voluntary payment doctrine.

Horton appealed.

DECISION: Affirmed.

The Supreme Court of Virginia also held that Horton was barred from being awarded reimbursement of the unlawful fees because it paid them "voluntarily" within the meaning of the voluntary payment doctrine.

On appeal, Horton had made four arguments for why its payment of the subject fees was involuntary so as to negate the Board's voluntary payment defense.

Horton argued that it paid the fees involuntarily because the County's refusal to issue the building permits without payment of the fees constituted a seizure of a property right consisting of Horton's right to develop the subdivision. The court disagreed. It held that there was no seizure of a property right effected by the County's unlawful demand for fee payments as Horton did not in any way "los[e] the right to develop its property" as a result of that demand; and indeed Horton proceeded with development.

Next, Horton asserted that it paid the fees involuntarily because it faced criminal charges if it proceeded without obtaining the permits from the County, or, alternatively, it faced breach of contract actions by third parties if it refused to go forward with its residential construction to avoid paying the fees. The court also rejected this claim. The court found no evidence that the County was threatening Horton with any criminal action or that Horton had executed any contract with a third party for construction of a residence in the subdivision. Furthermore, neither circumstance could be considered under the voluntary payment doctrine as a basis for establishing an involuntary payment without Horton showing as a threshold matter that there was an "immediate and urgent necessity" for paying the County's unlawful demand—which the court found was lacking.

For its third argument, Horton asserted that an immediate and urgent need to pay the fees rendered its payments involuntary. Horton contended that need was because it had to "do what it could to build and sell houses," which included paying the fees to obtain the permits authorizing their construction. The court again rejected Horton's argument. The court explained that to establish the requisite necessity to pay an unlawful demand, Horton had to show that it "had no time or opportunity before paying the County's unlawful demand to at least seek an appropriate legal remedy." The court found Horton failed to do so; Horton could have sought injunctive relief any time during the three and a half year period over which it paid the fees.

Finally, for its fourth argument, Horton contended that it had adequately protested the assessment of the fees. Rejecting that argument, the court noted that "simply protesting an unlawful demand does not render payment of the demand involuntary under the voluntary payment doctrine."

See also: *Barrow v. Prince Edward County, 121 Va. 1, 92 S.E. 910 (1917).*
See also: *Williams v. Consolvo, 237 Va. 608, 379 S.E.2d 333 (1989).*
See also: *Vick v. Siegel, 191 Va. 731, 62 S.E.2d 899 (1951)*

Case Note:

Horton had also argued that it was entitled to fee reimbursement because the County's retention of the fees unjustly enriched the County and was inherently inequitable. The court again rejected Horton's argument, finding that the voluntary payment doctrine provided the County a valid defense to a claim asserting unjust enrichment.

Inverse Condemnation—Condition placed on special exception is deemed unlawful

Property owner then claims condition amounted to a regulatory taking

Citation: *Midwest Minerals, Inc. v. Wilson, 2013 WL 772640 (Ind. Ct. App. 2013)*

INDIANA (02/27/13)—This case addressed the issue of whether a regulatory taking (i.e., inverse condemnation) occurred as a result of a condition placed on a special exception granted to the landowner.

The Background/Facts: Midwest Minerals, Inc. ("Midwest") owned real property (the "Property") in West Terre Haute in Vigo County (the "County"), Indiana. The Property was zoned M-2 heavy industrial and had been the site of a former coal mine. The County's Unified Zoning Ordinance (the "Ordinance") provided an exhaustive list of permitted uses in the M-2 heavy industrial district. The Ordinance also provided a list of activities that required a special exception, which included manufacturing gas.

Midwest sought to establish a molecular methane gas processing unit on the Property. The processing unit would allow Midwest to extract coal mine methane gas and then process it by filtering out impurities to bring the methane gas to commercial grade.

Because it was determined that Midwest's proposed activities would constitute "manufacturing" gas, Midwest was required, under the Ordinance, to apply to the Board of Zoning Appeals of the Area Plan Commission of Vigo County (the "BZA") to obtain a special exception.

Eventually, in 2005, the BZA granted the special exception subject to certain conditions. One of the conditions—"the public water condition"—required Midwest to provide public water to any residential use, existing and future, within one-half mile of any and all wells associated with coal mine methane processing to insure there would be no contamination of the water supply to the surrounding residences.

In 2007, Midwest challenged the public water condition, and the trial court removed the condition. The BZA did not appeal that decision.

In July 2009, Midwest filed a complaint against the BZA and the Board of Commissioners of Vigo County (collectively, the "Boards"). Midwest alleged that the public water condition constituted a taking without just compensation under Article I, § 21 of the Indiana Constitution. In particular, Midwest asserted that the BZA's actions in imposing the public water condition constituted a "complete deprivation of [Midwest's] property interest" from the time that the public water condition was issued, February 8, 2006, until the trial court ruled that the public water condition was invalid, on July 2, 2007. Midwest argued that during those 17 months, Midwest was unable to begin construction of the molecular gate processing unit. As such, Midwest claimed that it was therefore denied all economically beneficial or productive use of the land and was entitled to damages.

The trial court entered judgment for the Boards. The court held that the Boards' actions did not constitute a taking of Midwest's Property.

Midwest appealed.

DECISION: Affirmed.

The Court of Appeals of Indiana held that the Boards' actions did not constitute a taking (i.e., inverse condemnation) of Midwest's Property because Midwest was not deprived of all economic or productive use of the Property due to the public water condition.

The court explained that "inverse condemnation" "is a process provided by statute to allow persons to be compensated for the loss of property interests taken for public purposes without use of the eminent domain process." It provides a remedy for takings of property that would otherwise violate Article I, § 21 of the Indiana Constitution and the Fifth Amendment of the United States Constitution as made applicable to the states by the 14th Amendment. Specifically, Indiana Code 32-24-1-16 provides the statutory remedy for inverse condemnation. It provides that if a person's property is taken for public use without legal procedures followed, that person may be entitled to damages.

The court further explained that a "taking" includes any substantial interference with private property that "destroys or impairs one's free use and enjoyment of the property or one's interest in the property." If a regulation goes "too far," it will be recognized as a taking. In that regard, regulations that amount to takings include: regulations that require the property owner to suffer a physical "invasion" of his or her property; and regulations that deny all economically beneficial or productive use of land.

Here, Midwest had contended that, though zoned M-2 industrial, its Property had only one viable economic use: the molecular gate processing unit. The court rejected this contention. The court found that, while "not cost effective, it may be possible to remove and transport the methane gas [to be purified elsewhere] by pumping it into a truck." Thus, Midwest may have been able process gas offsite. Moreover, the court found that the Property was available for other uses including warehousing, recreational use, forestry, or a conservation club. Accordingly, the court concluded that Midwest had not been deprived of all economic or productive use of the property.

Still, the court acknowledged that, where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex set of factors, including: (1) the regulation's economic effect on the landowner; (2) the extent to which the regulation interferes with reasonable investment-backed expectations; and (3) the character of the government action.

Looking at these factors with regard to Midwest's Property, the court found: (1) that Midwest could not show a significant economic effect as a result of the alleged taking because Midwest had not purchased the subject property for the purpose of harvesting and processing methane gas in the first instance and had not held the property for many years without using it for any purpose; (2) that with respect to the alleged impact on reasonable investment-backed expectations, the evidence showed that any impact was insignificant since there was no evidence of any contractual deadlines for beginning construction on the molecular gate processing unit, and that nearly two years after the public water condition was struck down construction had yet to begin on the processing unit; and (3) that the character of the government action in this case supported the conclusion that there was no taking, for while the public water condition was ultimately struck down, the BZA implemented it believing it to be in the best interests of the public health.

The court concluded that the 17-month period of time that the public water condition was implemented did not constitute inverse condemnation.

See also: *Ragucci v. Metropolitan Development Com'n of Marion County, 702 N.E.2d 677 (Ind. 1998).*

See also: *Board of Zoning Appeals, Bloomington, Ind. v. Leisz, 702 N.E.2d 1026 (Ind. 1998).*

Standing—Nonprofit organization challenges state environmental agency's decision regarding planned Wal-mart

Wal-Mart argues the organization lacks standing to bring the challenge

Citation: *Clean Water Advocates of New York, Inc. v. New York State Dept. of Environmental Conservation, 103 A.D.3d 1006, 2013 WL 626923 (3d Dep't 2013)*

NEW YORK (02/21/13)—This case addressed the issue of whether a nonprofit organization had standing to challenge a determination of a state environmental agency to accept a stormwater pollution prevention plan ("SPPP") in connection with a proposal to construct a large retail store.

The Background/Facts: Wal-Mart Stores, Inc. ("Wal-Mart") sought to construct a Wal-Mart Supercenter in the Town of Lockport, Niagara County,

New York. In furtherance of that proposed project, Wal-Mart submitted a SPPP to the state Department of Environmental Conservation ("DEC"). The DEC accepted the SPPP.

Thereafter, the Clean Water Advocates of New York, Inc. ("CWA") filed a CPLR article 78 proceeding challenging DEC's determination. It alleged that "[s]tormwater discharges from construction activity contribute to the increase of pollutants" in the Tonawanda Creek, the Erie Canal, Lake Ontario and the Niagara River, which its members used for recreational purposes and as their potable water source.

The Supreme Court, Albany County found that CWA lacked standing to maintain the proceeding.

CWA appealed.

DECISION: Affirmed.

The Supreme Court, Appellate Division, Third Department, New York, also held that CWA lacked standing to challenge the DEC's decision to accept Wal-Mart's SPPP.

In so holding, the court explained that for an organization to have standing to bring a CPLR article 78 proceeding challenging administrative decision making, it must show that: "one or more of its members would have standing to sue[;] . . . that the interests it asserts are germane to its purposes so as to satisfy the court that it is an appropriate representative of those interests . . . [;] [and] that neither the asserted claim nor the appropriate relief requires the participation of the individual members." For an individual to establish standing, the individual "must demonstrate an injury-in-fact that falls within the zone of interests protected by the pertinent statute." Also, in matters involving land use development, the party challenging the administrative determination must show that he or she will "suffer direct harm, injury that is in some way different from that of the public at large." In matters alleging an impact upon a natural or cultural resource, the individual making the challenge must show that his or her use of a resource is more than that of the general public.

Here, CWA had identified one member of its organization, Joanne Woodhouse ("Woodhouse"), as a member that had standing to sue. Woodhouse had alleged that "[her] house [was] located within 900 feet of the [project site], 4 miles of the Tonawanda Creek, 1.5 miles of the Erie Canal, 14 miles of Lake [Ontario] and 22 miles of the Niagara River."

The court found that the proximity of Woodhouse's property to the proposed project did not, without more, give rise to a presumption that she would be adversely affected in a way different from the public at large. The court found that Woodhouse had failed to give more; she had failed to articulate any specific harm that she would suffer based on her proximity to the project.

The court also found that CWA had failed to demonstrate that the approval of the SPPP would: directly harm any of its members in their use and enjoyment of natural resources in some way different in kind or degree from that of the public at large; or that any injuries that its members would suffer due to the alleged impacts to the water bodies would be different from that faced by the general public. The court concluded that those "generalized allegations did

not demonstrate an injury distinct from the general public in the area" and therefore were insufficient to confer standing. Thus, having failed to establish that any of its members had standing to maintain the proceeding, CWA also lacked standing.

See also: *Finger Lakes Zero Waste Coalition, Inc. v. Martens, 95 A.D.3d 1420, 944 N.Y.S.2d 336 (3d Dep't 2012).*

See also: *New York State Ass'n of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 778 N.Y.S.2d 123, 810 N.E.2d 405 (2004).*

See also: *Society of Plastics Industry, Inc. v. County of Suffolk, 77 N.Y.2d 761, 570 N.Y.S.2d 778, 573 N.E.2d 1034, 21 Envtl. L. Rep. 21413 (1991).*

Nonconforming Use—In renovating water-damaged nonconforming use, property owner exceeds parameters of zoning permit

Borough issues a "stop work" order, saying total destruction of the structure terminated the nonconforming use

Citation: *Motley v. Borough of Seaside Park Zoning Bd. of Adjustment, 2013 WL 776544 (N.J. Super. Ct. App. Div. 2013)*

NEW JERSEY (03/04/13)—This case addressed the issue of whether a property owner's removal of every part of a nonconforming structure, except the foundation and footings, effected a total destruction of property, thus terminating the nonconforming use and the owner's right to continue that use.

The Background/Facts: Daniel Motley ("Motley") owned property (the "Property") in the Borough of Seaside Park (the "Borough"). The Property was in an R-3 zone, which was restricted to single-family uses. Motley's property was a preexisting nonconforming use because it contained two structures, a rear building -which Motley's brother occupied—and a front building (the "Building")—which Motley occupied. The two structures were erected in 1931, long before the zone restrictions were put into effect in 1972.

In 2006, pipes in the Building's hot water system burst and caused significant water damage. Motley decided to pursue renovations of the Building. In 2009, he applied to the Borough's Zoning Board of Adjustment (the "Board") for a zoning permit for "repair [and] renovation of [the] existing [Building]."

The Borough's zoning officer (the "ZO") approved Motley's permit application. The approval noted that there was to be "[n]o expansion of [the Building's] dimensions."

After Motley began renovations, it became clear that the Building was in "[m]uch worse condition than had been anticipated." Eventually, a Borough building inspector determined that the entire structure needed to be removed.

Motley proceeded with the demolition without contacting the ZO. Eventually, the entire structure was removed, except for the foundation and the footings.

In February 2010, after discovering the extent of demolition to the Building, the Borough's code enforcement office issued a stop work order. The ZO explained that Motley's demolition went beyond the scope of the zoning permit.

Motley contested the issuance of the stop work order and sought to have it vacated by the Board. The Board denied Motley's application to lift the stop work order. The Board based its decision on its determination that Motley's actions amounted to "total destruction" of the Building and exceeded the parameters of Motley's zoning permit. The Board referenced the Borough's zoning ordinance § 25-616(E) (the "Ordinance"). The Ordinance stated that a preexisting nonconforming use may be repaired or maintained, so long as the repair or maintenance did not result in the "total destruction" of the property. New Jersey statutory law (N.J.S.A. 40:55D-68) similarly provides that: "[a]ny nonconforming . . . structure . . . may be restored or repaired in the event of partial destruction thereof."

Motley filed a legal action, seeking to overturn the Board's decision.

The trial court reversed the Board's decision and lifted the stop work order. The court found that replacement of the Building, without altering the original dimensions, was "not unreasonable . . . upon discovery of the unsafe and dilapidated condition of the existing walls."

The Board appealed.

DECISION: Affirmed in part and reversed in part.

The Superior Court of New Jersey, Appellate Division, disagreeing with the trial court, held that the "stop work" order was justified by Motley's: effective "total destruction" of the Building—in violation of the Ordinance and N.J.S.A. 40:55D-68; and improper conduct in exceeding the limitations of the zoning permit.

In so holding, the court noted that the policy with preexisting nonconforming uses is "to restrict them closely." Moreover, noted the court, "given the statutory objective to eradicate nonconforming uses over time, local governing bodies may not adopt ordinances that authorize the restoration or replacement of all nonconforming structures, even on the condition that the cubic size of the replacement structure does not exceed the size of the existing structure."

Analyzing N.J.S.A. 40:55D-68, which again provides that: "[a]ny nonconforming . . . structure . . . may be restored or repaired in the event of partial destruction thereof," the court noted that the statute did not define "partial destruction." The court determined that, in analyzing whether more than "partial destruction has occurred," it must "consider whether the destruction is so substantial in nature—qualitatively if not quantitatively—to surpass the 'partial' threshold that the statute expresses."

Here, the court agreed with the Board's position that Motley's removal of all of the walls of the building down to the foundation and footings exceeds any reasonable notion of a mere partial demolition.

The court also held that the stop work order was justified by Motley's

improper conduct in exceeding the limitations of the zoning permit that had been issued to him. The court rejected Motley's contentions that the stop work order should be overturned based on: "equitable estoppel" or "relative hardship." Here, found the court, Motley was not in a situation where he had reasonably relied on the ZO's express permission to do something. Rather, Motley had exceeded the scope of this zoning approval and created the very problem from which he was seeking to extract himself. The root of Motley's loss was Motley's actions in ignoring the limitations of the zoning approval and in failing to consult with the proper local officials when it appeared that more of the Building needed to be removed.

See also: *Lacey Tp. v. Mahr, 119 N.J. Super. 135, 290 A.2d 450, 57 A.L.R.3d 415 (App. Div. 1972).*

See also: *Krul v. Board of Adjustment of City of Bayonne, 122 N.J. Super. 18, 298 A.2d 308 (Law Div. 1972), aff'd, 126 N.J. Super. 150, 313 A.2d 220 (App. Div. 1973).*

See also: *Hill v. Board of Adjustment of Borough of Eatontown, 122 N.J. Super. 156, 299 A.2d 737 (App. Div. 1972).*

Case Note:

In its decision, the court noted the concern that the limitations on reconstruction that are set forth in N.J.S.A. 40:55D-68 "may sometimes lead to harsh outcomes for owners of nonconforming structures who innocently come to learn that their buildings must be demolished." However, the court found that policy concern, "to the extent it has any validity," is best reserved for a potential legislative response, either through statutory amendments or through the adoption of municipal ordinances within the powers delegated to local governing bodies. Still, noted the courts, it is the prerogative of municipalities to ensure that such nonconformities eventually "wither and die." "Accordingly, if an owner such as [Motley] allows his nonconforming building to degrade into a poor condition that requires a complete destruction of the building, the municipality should be permitted to terminate that use and require conformity," said the court.

Zoning News from Around the Nation

MASSACHUSETTS

State Attorney General Martha Coakley has rejected a zoning bylaw of the Town of Reading, which would have banned marijuana dispensaries. The attorney general told the town clerk that the blanket ban on dispensaries would "frustrate the purpose" of the state ballot question approved by voters last fall legalizing marijuana for medicinal purposes in Massachusetts. The attorney general's office did reportedly conclude that municipalities could adopt zoning by-laws to regulate the location of marijuana treatment centers within towns and could adopt zoning by-laws to regulate treatment centers or enact temporary bans.

Source: *The Stoneham Sun; www.wickedlocal.com*

NEW YORK

The Appellate Division of the state supreme court recently heard an appeal of a lower court's ruling that held that the Town of Dryden has the right to ban fracking in its boundaries. A decision from the court was expected in approximately six to eight weeks.

Source: *Times Union; www.timesunion.com*

NORTH CAROLINA

The state House has passed House Bill 150, entitled "An Act to Clarify When a County or Municipality May Enact Zoning Ordinances Related to Design and Aesthetic Controls." The purpose of the Act is to "clarify" that local governments in North Carolina do not have the power under zoning enabling legislation to control building design elements of homes. Among other things, the Act specifies that a local government cannot, under their zoning powers, control the following with respect to residences: exterior building color; type or style of exterior cladding material; style or materials of roof structures or porches; exterior nonstructural architectural ornamentation; location or architectural styling of windows and doors, including garage doors; the number and types of rooms; and the interior layout of rooms. The proposed legislation's companion bill, SB 139, must now be approved by the state senate.

Sources: *Triangle Business Journal; http://www.bizjournals.com/triangle; The National Law Review; http://www.natlawreview.com*

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Preemption—Natural gas substation operator denied expansion based on county zoning laws

Operator contends county zoning laws are preempted by the Natural Gas Pipeline Safety Act and the Natural Gas Act

Citation: *Washington Gas Light Co. v. Prince George's County Council, 2013 WL 1189296 (4th Cir. 2013)*

Contributors

Corey E. Burnham-Howard

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The Fourth Circuit has jurisdiction over Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

FOURTH CIRCUIT (MARYLAND) (03/25/13)—This case addressed the issues of: whether the Natural Gas Pipeline Safety Act preempted county zoning plans; and whether the Natural Gas Act preempted county zoning plans.

The Background/Facts: Washington Gas Light Company ("Washington Gas") operated a natural gas substation in Prince George's County, Maryland (the "County"). Washington Gas sought to expand that substation with the addition of a liquefied natural gas ("LNG") storage tank. The County denied Washington Gas' requested approval of the LNG storage tank based on recently enacted county zoning plans (the "County Zoning Plans"). The County Zoning Plans were "aimed at maximizing 'transit-oriented development' and prohibited all industrial usage in the area" that included Washington Gas' substation site (the "Site").

Following the denial of its proposed expansion, Washington Gas eventually brought a federal action seeking, among other things: (1) a declaration that the federal Natural Gas Pipeline Safety Act (the "PSA") preempted the County Zoning Plans; and (2) a declaration that the federal Natural Gas Act ("NGA") preempted the County Zoning Plans. Washington Gas argued that the PSA comprehensively regulated LNG facility siting and therefore the PSA preempted the County Zoning Plans. Washington Gas also argued that the NGA transferred jurisdiction over the enlargement or expansion of Washington Gas' facilities to the Maryland Public Service Commission ("MDPSC") and that that delegation of authority preempted the County Zoning Plans.

The County filed a counter-claim seeking a declaration that federal law did not preempt the County Zoning Plans.

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the district court granted summary judgment in favor of the County.

DECISION: Affirmed.

The United States Court of Appeals, Fourth Circuit, agreed with the County and the district court: neither the PSA nor the NGA preempted the County Zoning Plans.

In so concluding, the court explained that under the Supremacy Clause of the United States Constitution, federal law is the "supreme Law of the Land." (U.S. Const. art. VI, cl. 2). Accordingly, federal law preempts any conflicting state law. Preemption, further explained the court, generally occurs in one of three circumstances: (1) when federal law expressly declares the intention that state law be preempted; (2) when federal law impliedly preempts state law by so occupying the

field of regulation that there is "no room left for the states to supplement federal law"; and (3) when federal and state law actually conflict.

Here, the court found that none of those circumstances existed in relation to the PSA and the County Zoning Plans. The court held that the PSA did not expressly preempt the County Zoning Plans. Rather, the PSA expressly preempted state and local law in the field of pipeline safety (49 U.S.C.A. § 60104(c) (2006)) and the County Zoning Plans were not safety regulations but were land use regulations "designed to foster residential and recreational development." Moreover, said the court, even assuming safety concerns played some part in the enactment of the County Zoning Plans, those concerns would have been merely incidental to the overall purpose of the County Zoning Plans, and therefore insufficient to justify a finding that the County Zoning Plans were, in fact, safety regulations preempted by the PSA.

"Because the County Zoning Plans [were] beyond the scope of the PSA's express preemption provision," the court also found it "unlikely" that the PSA impliedly preempted the County Zoning Plans. The court said that even if it "were to find that the PSA has preemptive effect beyond the express preemption provision . . . [it] would not conclude that Congress intended the PSA to occupy the field of natural gas facility siting" since the PSA expressly did "not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility." (49 U.S.C.A. § 60104(e) (2006).)

Also, the court also held that the PSA did not preempt the County Zoning Plans by conflict. Here, the court found that because the County Zoning Plans were not safety standards, they did not stand as an obstacle to the PSA's purpose of creating federal minimum safety standards on all natural gas pipeline facilities.

Washington Gas had also argued that the NGA transferred jurisdiction over the enlargement or expansion of Washington Gas' facilities to the MDPSC and that that delegation of authority preempted the County Zoning Plans. The Court of Appeals disagreed. The court held that the NGA did not preempt the County Zoning Plans because the NGA only preempted state and local laws governing *interstate* natural gas operations, and here, Washington Gas, although crossing state lines, was treated as a local distribution company under a Federal Energy Regulatory Commission grant for service area determination.

See also: *Texas Midstream Gas Services, LLC v. City of Grand Prairie, 608 F.3d 200 (5th Cir. 2010).*

See also: *Algonquin Lng v. Loqa, 79 F. Supp. 2d 49, 147 O.G.R. 128 (D.R.I. 2000)* (holding that a city zoning ordinance requiring the operator of an *interstate* natural gas pipeline facility to obtain local zoning approval for a proposed modification was preempted by the NGA and PSA).

Case Note:

Washington Gas had also sought a declaration that Maryland's mandatory referral procedure applied to the LNG project. Maryland's mandatory referral statute exempts certain public utility projects from local zoning review. (See Md. Code Ann., Land Use § 20-301). Washington Gas argued that, as a privately owned public utility, mandatory referral plainly applied to its proposed extension.

The district court abstained from resolving that count under the "abstention doctrine" articulated in Burford v. Sun Oil Co., 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943). Under that doctrine, "courts may abstain when the availability of an alternative, federal forum threaten[s] to frustrate the purpose of a state's complex administrative system." Specifically, Burford abstention is permissible when:

> *[F]ederal adjudication would 'unduly intrude' upon 'complex state administrative processes' because either: (1) 'there are difficult questions of state law whose importance transcends the result in the case then at bar'; or (2) federal review would disrupt 'state efforts to establish a coherent policy with respect to a matter of substantial public concern.'*

Here, the Court of Appeals agreed that the Burford abstention was appropriate. The court found it appropriate because the resolution of Washington Gas' mandatory referral county turned on whether Maryland's mandatory referral statute should have been applied. The answer to that depended on the construction of the state land use statute—and specifically the definition of "privately owned public utility."

Proceedings—Residents allege agenda item for zoning board's meeting violated state Open Meetings Act

Residents claim agenda item failed to specify the nature of the business to be discussed

Citation: *Anolik v. Zoning Bd. of Review of City of Newport, 2013 WL 1314947 (R.I. 2013)*

RHODE ISLAND (04/02/13)—This case addressed the issue of whether the information contained in a published agenda item sufficiently satisfied the requirements of the Rhode Island's Open Meetings Act, § 42-46-6(b).

The Background/Facts: In November of 2008, the Zoning Board of Review of the City of Newport (the "Board") received a letter from Turner Scott, counsel for Congregation Jeshuat Israel. The letter requested an extension of the time in which to substantially complete certain improvements to Congregation Jeshuat Israel's property that had been approved by a previous zoning board decision. That previous decision had expressly contained a condition to the effect that there be substantial completion of the improvements within two years.

Turner Scott's request for an extension of time was referenced in one of the items contained in the "AGENDA" that was posted with respect to a February 23, 2009 Board meeting. That agenda item read in its entirety as follows:

"IV. Communications:

Request for Extension from Turner Scott received 11/30/08

Re: Petition of Congregation Jeshuat Israel"

The Board voted unanimously at the February 23, 2009 meeting to approve the request for an extension of time. That vote was reflected in a decision of the Board, dated March 24, 2009, which required (1) that the "improvements must be started and [be] substantially complete [by] February 23, 2011," and (2) that counsel for Congregation Jeshuat Israel would provide "a written update on the progress of the project on or before February 23, 2010."

In August 2009, Sheila Anolik, Wendy Anolik, and Jeffrey Anolik (the "Anoliks") filed a legal complaint in superior court, alleging that the above-quoted agenda item violated the Rhode Island Open Meetings Act (§ 42-46-6(b).). The Anoliks contended that the agenda item violated the Act because it was a "vague and indefinite" notice to the public and "one lacking specificity."

Among other things, the Open Meetings Act requires that public bodies give: "written notice of their regularly scheduled meetings"; and "give supplemental written public notice of any meeting within a minimum of forty-eight (48) hours before the date [of the meeting]." (Section 42-46-6(b).) With respect to that "supplemental written public notice," the statute provides:

> This notice shall include the date the notice was posted, the date, time and place of the meeting, and *a statement specifying the nature of the business to be discussed.* (Emphasis added).

Here, the Anoliks contended that the agenda item did not constitute "a statement specifying the nature of the business to be discussed," as required by the Open Meetings Act.

The superior court disagreed. Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the court issued summary judgment in favor of the Board.

The Anoliks appealed.

DECISION: Vacated and matter remanded with instructions.

The Supreme Court of Rhode Island agreed with the Anoliks. It held that the contested agenda item failed to meet the requirements of the Open Meetings Act.

The court explained that when the General Assembly included in § 42-46-6(b) a requirement that there be "a statement specifying the nature of the business to be discussed," without explicitly indicating what such a statement should include, it "intended to establish a flexible standard aimed at providing fair notice to the public under the circumstances . . . ." Accordingly, the court said that, here, the Board was required to "provide fair notice to the public under the circumstances, or such notice based on the totality of the circumstances as would fairly inform the public of the nature of the business to be discussed or acted upon."

Here, the court found that the disputed agenda item failed to "reasonably describe the purpose of the meeting or the action proposed to be taken . . . ." The court found the agenda item simply indicated that a communication had been received from on Turner Scott regarding a petition of Congregation Jeshuat Israel. The court also found that the agenda item failed to: specify the property that was at issue, providing no information as to a street address, a parcel or lot number, or even an identifying petition or case number; or to provide any information as to exactly what was the reason for the requested extension or what would be its duration. Additionally, and determinatively, the court also found that by designating the agenda item under the rubric of "Communications," the Board failed to inform the public that any action would be taken with respect to the agenda item. The court determined that "in no way [did] the agenda item give notice that the request for extension was to extend the temporal parameters then in effect for the purpose of completing or substantially completing the improvements."

Because the agenda item did not fairly inform the public of the nature of the business to be discussed or acted upon, the court concluded that it did not comply with the standards established by the Open Meetings Act.

The court vacated the superior court's grant of summary judgment in favor of the Board. Also, the court remanded the matter to the superior court with instructions that: summary judgment be issued in favor of the Anoliks; and action taken by the Board with respect to the extension requested by Turner Scott be declared null and void.

See also: *Tanner v. Town Council of Town of East Greenwich, 880 A.2d 784 (R.I. 2005).*

Use—County approves conditional use permit allowing winery to host events, construct commercial kitchen

Conservation appeals permit approval, arguing such activities are not "commercial uses in conjunction with farm use" as required by state statute

Citation: *Friends of Yamhill County v. Yamhill County, 255 Or. App. 636, 2013 WL 1136795 (2013)*

OREGON (03/19/13)—This case addressed the issue of whether a winery's proposal for a new tasting room and the hosting of up to 44 events per year on property zoned exclusive farm use constituted a "commercial use in conjunction with a farm use," as required in order for the winery to obtain a conditional use permit.

The Background/Facts: Stoller Vineyards, Inc. ("Stoller") operated on property consisting of approximately 373 acres and zoned "exclusive farm use" ("EFU"). Over 180 acres of the property was planted in vineyards, with plans to plant 30 to 40 more acres of vineyard. Stoller produced 10,000 to 12,000 cases of wine annually. It also sold an additional 220 tons of fruit annually.

In 2001, Yamhill County (the "County") approved Stoller's application for a winery under the authority of what is now codified as ORS 215.283(1)(n) (establishing wineries as a permitted use in EFU zones) and ORS 215.452 (setting forth the requirements for permitted-use wineries in EFU zones).

In May 2011, Stoller applied for a conditional-use permit ("CUP") to construct a new building that would include a "tasting room, commercial kitchen, offices and storage." It also proposed to conduct 44 events per year on the property and requested approval to provide meal service at the events.

Subject to various conditions, the County approved Stoller's CUP application under Oregon statutory law, ORS 215.283.2(a). ORS 215.283(2)(a) provides that certain specified nonfarm uses may be established, subject to the approval of the governing body in any EFU zone, including: "[c]ommercial activities that are in conjunction with farm use."

Friends of Yamhill County ("Friends") appealed the County's decision to the state Land Use Board of Appeals ("LUBA"). Friends argued

that the CUP was approved in error because: (1) the approved commercial activity—in particular, the "events venue and commercial food service facility"—was a new use that could not be considered to be "in conjunction with farm use" under ORS 215.283(2)(a); and (2) even if it was, the level of activity exceeded the "incidental" limitation imposed on such activity under the applicable law.

The County, on the other hand, contended that this case presented a straightforward application of ORS 215.283(2)(a).

LUBA agreed with the County.

Friends appealed.

DECISION: Affirmed.

The Court of Appeals of Oregon also agreed with the County. It held that the County properly approved Stoller's CUP application because the proposed new tasting room and commercial kitchen were commercial uses in conjunction with farm use, as permitted under ORS 215.283(2)(a).

The court explained that although "in conjunction with a farm use" was not statutorily defined, courts had interpreted that the commercial activity "must enhance the farming enterprises of the local agricultural community to which the EFU land hosting that commercial activity relates." Also, the court noted that the state legislature had specifically authorized wineries as "permitted uses" in EFU-zoned land and had explicitly allowed wineries to sell "[i]tems directly related to the sale and promotion of wine produced in conjunction with the winery, the sale of which is incidental to retail sale of wine on-site . . . ." (ORS 215.452(2)(b).) In addition, the legislature had clarified the meaning of "incidental" by imposing a limit on gross income from the sale of incidental items of not more than "25 percent of gross income from the retail sale on-site of wine produced in conjunction with the winery."

Here, the court found that Friends was essentially arguing that the commercial activities proposed by Stoller were not activities in conjunction with the vineyard (i.e., a farm use), but were, at most, activities in conjunction with the winery (i.e., a nonfarm use). The court rejected that argument. It held that "incidental activities" such as tasting rooms and associated retail sale activities were permitted as farm-use-related commercial activities "to the extent that they are secondary to and support the wine processing activities of the winery." Thus, the court rejected Friends' argument that a tasting facility and associated wine-marketing activities categorically could not be considered to be "in conjunction with farm use" because such activities were in conjunction with a winery rather than a viticulture farm use.

The court also rejected Friends' argument that the 44 authorized events and commercial kitchen exceeded the scope of what was permis-

sible under ORS 215.283(2)(a). The court said that "the type of activity proposed [was] not necessarily the determining factor." Rather, "to be 'in conjunction with farm use,' the commercial activity must enhance the farming enterprises of the local agricultural community to which the EFU land hosting that commercial activity relates." As long as the commercial use assisted farmers in processing and marketing crops and encouraged people to visit the area and buy the produce of the vineyards and surrounding farms, the commercial use could be permissible under ORS 215.283(2)(a), concluded the court.

Nevertheless, the court acknowledged that not all commercial activities tied to the marketing of wine would be allowable as a farm-use-related commercial activity in connection with a vineyard operation. Rather, the court said that "any commercial activity beyond the direct processing and selling of wine must, to be approved as a commercial activity in conjunction with the farm use of viticulture, be both 'incidental' and subordinate to the processing and selling activities of the winery."

Here, the court agreed with LUBA that the County's approval of 44 events annually and a commercial kitchen at the Stoller Winery came "dangerously close to creating a scenario in which the incidental and secondary activities (events and food service) overtake the primary activity (the processing and selling of wine)." However, the court also concluded that the County approval of Stoller's CUP application fell within the scope of ORS 215.283(2)(a) since the approval imposed conditions that were "designed to ensure that the event and food-service activities w[ould] remain incidental and secondary to the processing and sale of wine." Specifically, here, the County had required that the 44 events be "directly related to" the sale and promotion of wine produced at the winery. In addition, income from the approved non-wine-related activity could not exceed 25% of the gross income from onsite retail sales of wine from the winery. Moreover, the ability to provide meal service was limited to the 44 events, and the onsite kitchen could not serve more than 72 guests per event. Stoller was required to submit an annual report demonstrating that it was meeting the imposed conditions. Moreover, here, Stoller's event and food-service activities were intended to promote Stoller wines and could be reasonably expected to enhance Stoller's wine marketing. In short, the activities would "reinforce the profitability of operations and the likelihood that agricultural use of the land will continue," concluded the court.

See also: *Craven v. Jackson County, 94 Or. App. 49, 764 P.2d 931 (1988), decision aff'd, 308 Or. 281, 779 P.2d 1011 (1989).*

Zoning News from Around the Nation

CONNECTICUT

The state Senate Public Health Committee has advanced Senate Bill 115, which would amend existing state law to prohibit from residential nursing home placement people convicted of sexual assault or murder. Language in the bill provides that nothing in it "shall be construed to limit any powers lawfully executed by any zoning commission or any planning commission . . . ." The bill will now be considered by the Senate Judiciary Committee.

Source: *The Hartford Courant; http://articles.courant.com*

FLORIDA

"A proposal to give commercial developers a three-year break on impact fees for roads when building small projects is advancing in the Legislature over the objections of Florida's cities and counties." Opponents of the legislation—SB 1716 and HB 321—reportedly claim "the moratorium could hinder efforts to build new roads and expand existing ones needed to keep up with growth." Supporters reportedly argue "that the intent is to help 'mom and pop' developers by waiving the road impact fees for new commercial projects that are building up to 6,000 square feet." SB 1716 has "received unanimous support from Community Affair" and will be considered by the Senate Education Committee. HB 321 has "received overwhelming support from both the Economic Development and Tourism Subcommittee and Finance and Tax Subcommittee, with the next appearance before the Finance and Tax Subcommittee."

Source: *Jacksonville Business Journal; www.bizjournals.com/jacksonville*

IDAHO

The state Senate has passed, and the House is debating, SB 1192a—a bill that would exempt a state parking garage project near the Capitol from Boise city planning and zoning requirements.

Source: *The Spokesman-Review; www.spokesman.com*

TEXAS

The state Senate has approved legislation "that would provide zoning protection to Austin neighborhoods when the state develops its land with public-private partnerships." Senate Bill 507 "would require the state to submit plans for public-private projects on state land—other than the Capitol complex—to municipal zoning. But if a city

turns down the zoning, the state can appeal to a seven-member board that includes a majority of state officials."

Source: *Statesman; www.statesman.com*

WISCONSIN

State Senator Kathleen Vinehout is introducing a bill that would require those selling property to disclose knowledge of a contract, or an option to contract that allows for frac-sand mining on the property. The proposed bill would also: "require local government considering a frac-sand mine application to notify the public in advance through newspaper reports as well as written notices to property owners near the proposed mine prior to taking action"; and require "a license for those who are prospecting for mine sites." It also would list frac-sand mining as a conditional use in areas zoned for agriculture with the intention to "give local officials an opportunity to negotiate conditions for operation of a mine."

Source: *River Falls Journal; www.riverfallsjournal.com*

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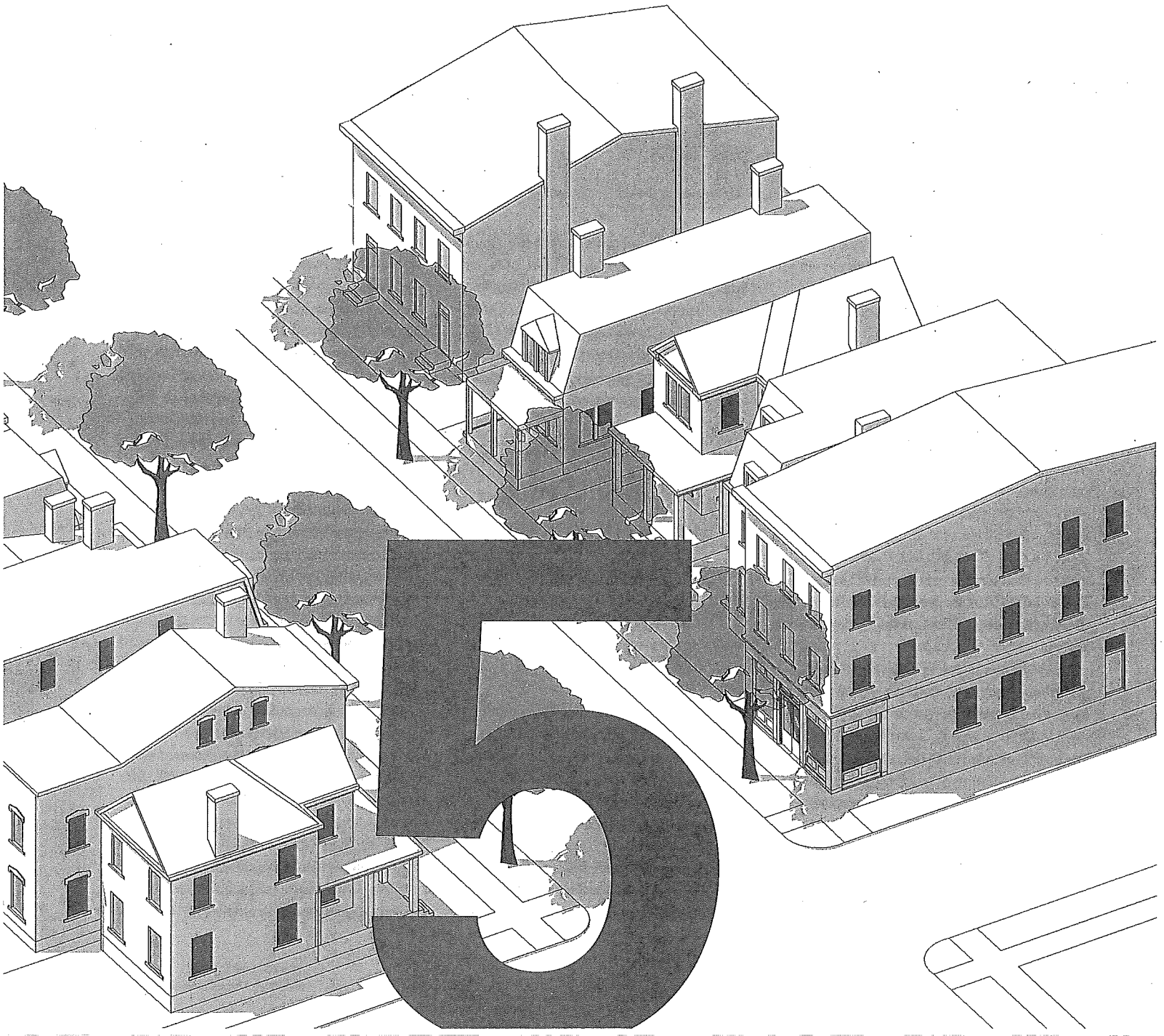
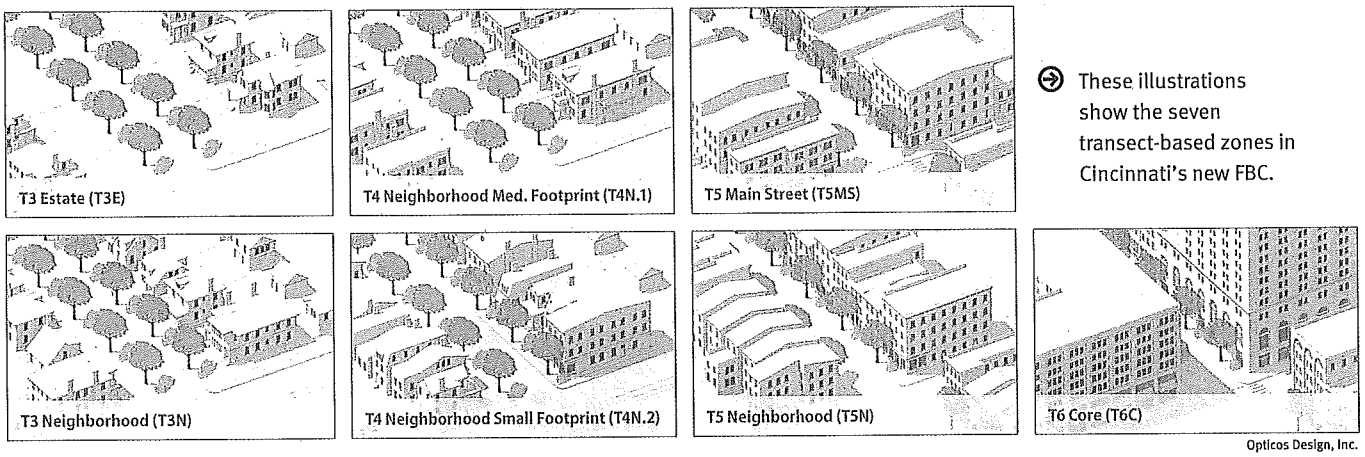
PRACTICE FORM-BASED ZONING



Avoiding Common Form-Based Code Mistakes, Part 1

By Daniel Parolek



These illustrations show the seven transect-based zones in Cincinnati's new FBC.

Opticos Design, Inc.

Most cities have a broken zoning system that is not delivering the type of development they want or need to be able to respond to shifting market demands for walkable urban places or other trends that will enable them to compete as 21st century cities or regions. As Rouse and Zobl explained in the May 2004 issue of *Zoning Practice*, there are two fundamental problems with Euclidean zoning: (1) separating uses and limiting density has led to excessive land consumption and (2) proscriptive development standards have proven ineffective in protecting traditional urban neighborhoods from incompatible development. Consequently, it's no surprise that a growing number of communities have expressed interest in the form-based code (FBC) as a potential solution to the problems posed by conventional, Euclidean, zoning.

While form-based coding was conceptualized as a comprehensive, communitywide approach to regulating the form of development in a city or region, at the time of Rouse and Zobl's article, most FBCs applied only to specific neighborhoods or districts. The good news is that the theory has now been proven in practice.

Since 2004, citywide FBCs have spread rapidly to large cities like Miami and Denver; medium-sized cities like Cincinnati; towns like Flagstaff, Arizona, and Livermore, California; and even small rural communities like Kingsburg, California. At the county level, Lee, North St. Lucie, and Sarasota counties in Florida have all adopted FBCs, and Beaufort County, South Carolina, and Kauai County (the entire island), Hawaii, are currently working on new codes. Even in the sprawling Phoenix region, Mesa, Arizona, has adopted a FBC to prepare its downtown to capture the transformative potential of transit, and Phoenix is about to embark on an FBC effort after an early failed attempt. In fact, as of November 2012, there were more than 250 adopted FBCs across the country, with 82 percent adopted since 2003 (Borys and Talen).

Most cities have a broken zoning system that is not delivering the type of development they want or need.

In this same period, the proliferation of articles on form-based coding in trade publications such as *Urban Land*, *The Urban Lawyer*, *Economic Development Journal*, and *Builder* testifies to spreading interest among developers, land-use attorneys, economic development professionals, and home builders. In 2004, a group of early form-based coding practitioners and advocates founded the Form-Based Codes Institute to promote best practices and expand awareness, and the first comprehensive book on the topic, *Form-Based Codes: A Guide for Planners, Urban Designers, Municipalities, and Developers*, appeared in 2008.

The flip side of this wave of adoptions is that many cities have experienced ineffective or failed past attempts at form-based coding. There are two primary reasons for this. First, there is a shortage of practitioners who can do form-based coding well. The combination of technical zoning knowledge and understanding of how to write effective regulations—combined with the need for strong urban design skills that enables the FBC writer to understand what makes a community unique, what will make it better, and what built results the code writing will influence—is not a common set of skills taught to planners or architects. Second, many cities do not have the knowledge to know what to ask for or demand of their consultants in a form-based coding process. An estimated half of the cities asking for FBCs are simply getting "user-friendly" updates that do not address the core problems in the code.

ASK THE AUTHOR JOIN US ONLINE!

Go online during the month of May to participate in our "Ask the Author" forum, an interactive feature of Zoning Practice. *Daniel Parolek will be available to answer questions about this article. Go to the APA website at www.planning.org and follow the links to the Ask the Author section. From there, just submit your questions about the article using the e-mail link. The author will reply, and* Zoning Practice *will post the answers cumulatively on the website for the benefit of all subscribers. This feature will be available for selected issues of* Zoning Practice *at announced times. After each online discussion is closed, the answers will be saved in an online archive available through the APA* Zoning Practice *web pages.*

About the Author

Daniel Parolek is coauthor of the first comprehensive book on FBCs, *Form-Based Codes: A Guide for Planners, Urban Designers, Municipalities, and Developers*. He is a founding board member of the Form-Based Codes Institute, and founding principal of Opticos Design, Inc., a California Benefit Corporation. Opticos's recent and current form-based coding work includes a citywide FBC for Cincinnati, Ohio, FBCs for downtown Mesa, Arizona, and three major commercial corridors in Richmond, California, and a SmartCode update for Petaluma, California's SMART Station Area.

Fortunately, this is changing as senior planning staff members learn more about the best practices of form-based coding, schools begin to teach more courses in smart growth planning and form-based coding, and people continue to educate themselves on these topics.

The form-based coding approach and methodology presented in the articles mentioned above represent a paradigm shift in the way we write zoning codes, not just an attempt to add an additional layer of form-based regulations on a use-based system. The intent of this two-part series is to give communities the knowledge to know what to ask for and what to request of their consultants, and for consultants to understand how to select the most effective form-based code approach. These two articles will address common form-based coding misconceptions and highlight common mistakes to avoid based on up-to-date best practice standards learned from the most recent applications. They will also compare different approaches for regulating urban form and give them appropriate labels so they are not confused or used interchangeably.

COMMON MISCONCEPTIONS

Even with the growing application of FBCs to neighborhoods, cities, and regions across the country, many communities remain hesitant to embrace form-based coding. Undoubtedly, some of this hesitation is rooted in common misconceptions related to FBCs.

Form-Based Codes Are Relatively Untested

Contrary to popular belief, FBCs have been tested in the marketplace. Here are statistics from just two projects to summarize the potential economic benefits of an FBC. First, along the Columbia Pike corridor in Arlington County, Virginia, more than 1,300 units and almost 250,000 square feet of nonresidential space have been built in eight different projects with complex infill conditions under the Columbia Pike Form-Based Code since its adoption in 2004. Second, from 2005 to 2008, the taxable value of properties subject to FBCs in Nashville, Tennessee, increased in value by an average of 75 percent and one area, Ridgeview, showed a 2,000 percent increase in value. This was compared to a 27 percent increase in value in

COMPONENTS OF A FORM-BASED CODE

Communities should analyze how effective the entire FBC system, not its individual components, is for responding to planning trends and goals. FBCs are more than just mixed use zoning districts. Here is an overview of standard and optional components:

- **Building Form Standards:** Building form standards are form-based zone standards that replace the existing zone standards. They are the core component of an FBC and typically regulate the configuration, features, and functions (uses) for buildings that define and shape the public realm. To be the most effective, their content should be generated primarily by community character documentation as opposed to the preexisting zone standards for each area.
- **Regulating Plan:** A regulating plan is the map assigning the code's various standards to physical locations, including the form-based zone standards. It replaces the zoning map in a form-based code. In a citywide form-based code it is the same as the zoning map and will have form-based and non-form-based zones on it. It is usually applied in a more fine-grained manner than a zoning map, taking existing and intended form into account.
- **Frontage Type Standards:** Frontage type standards regulate the appropriate transition from the private realm to the public realm. The ultimate intent of frontage standards is to ensure, after a building is located correctly, that its interface with the public realm and the transition between the two are detailed appropriately.
- **Public Space Standards:** Public space standards are specifications for the elements within the public realm, including thoroughfares and civic spaces. Thoroughfare standards incorporate detailed requirements for sidewalk, parking lane, and travel lane widths and street tree locations. Civic space standards regulate parameters, such as maximum and minimum size, and introduce a range of nonsuburban civic space types into a city or town.
- **Building Type Standards:** Many FBCs include building type standards that are supplemental to the building form standards. They introduce an appropriate range of building types that are allowed within each form-based zone and regulate form characteristics specific to each type. To be effectively regulated, especially when applied at a larger scale, building type standards should be tied back directly to zone standards.

areas not subject to a FBC. Keep in mind this construction and the property value increase took place, in part, during one of the largest economic recessions in this country's history. Has this gotten your attention yet?

Form-Based Codes Are for Greenfields

While it is true that modern form-based coding was pioneered by the planners of Seaside, Florida, 30 years ago, FBCs have since proven to be an effective tool for regulating complex urban environments. For the past 10 to 15 years, the practice of form-based coding has focused on replacing existing zoning in existing urban environments. This can be seen in the examples introduced above and the growing list of non-greenfield FBCs (Borys and Talen 2012).

FBCs Are Just Guidelines

An effective FBC replaces the existing zoning and eliminates the need for guidelines. See the section below that compares different approaches to regulating urban form.

Form-Based Coding Is Too Complicated

Form-based coding is sometimes seen as being too complicated because the practice is relatively new and not well understood. Unlike conventional zoning, it integrates urban design as an integral part of the coding process. From a procedural perspective, applying a FBC is not any more complicated than a typical rezoning, but writing a successful FBC does require a different skill set than a conventional zoning ordinance. The FBC process engages the community, builds upon the unique characteristics that communities value, and, in the end, is a document that anyone can pick up and easily understand and use. If the task of applying FBCs seems daunting, start small and let it spread.

Form-Based Coding Is a Boilerplate Approach

Often this misconception originates from inappropriate use of the SmartCode template. The SmartCode is a free model FBC created by Duany Plater Zyberk & Company, and while it is true that many communities have adopted FBCs based on the SmartCode, the code's authors never intended a community to adopt it in whole or in part without first calibrating it to a specific local context. Furthermore, many FBCs are not rooted in the SmartCode at all.

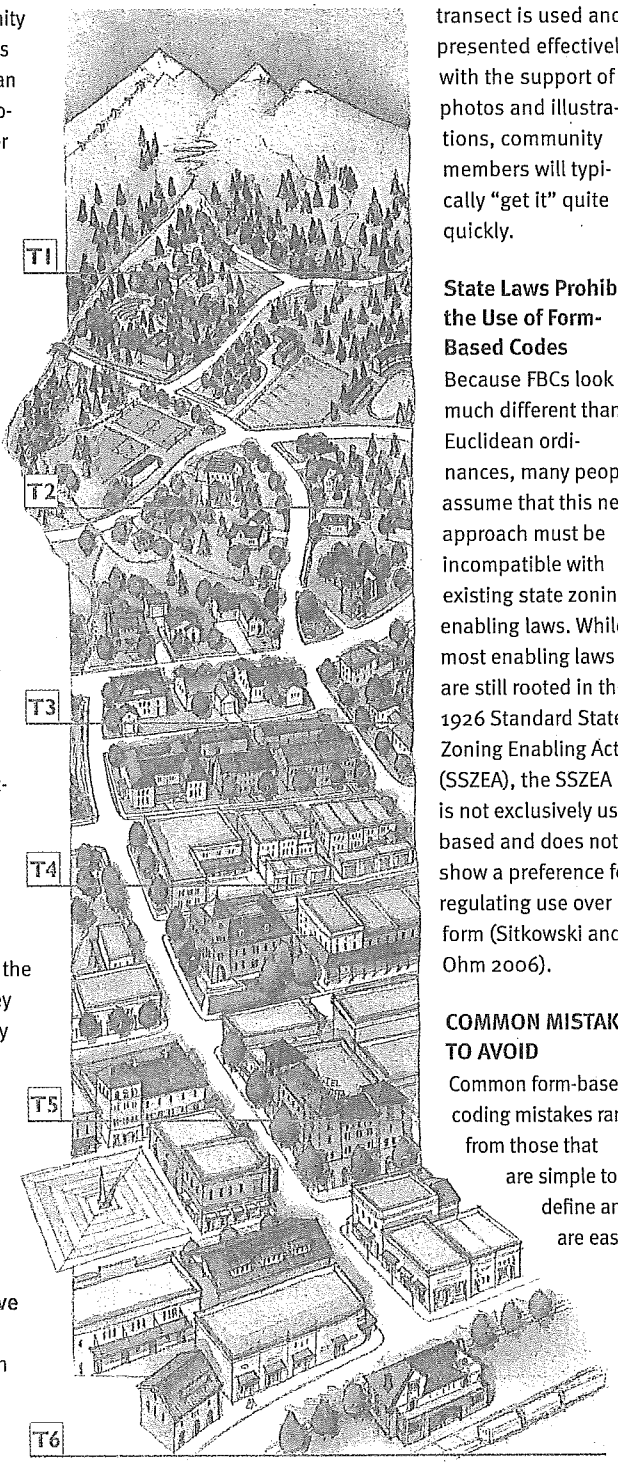
In reality, the extensive community character documentation and analysis phase completed in a FBC process is often far more extensive than any community character assessment that is typically done for a Euclidean code, and this extensive process enables the code writer to extract the unique DNA from a community's urban form and make that the basis for the framework and regulations within the code. This documentation, analysis, and calibration stage will be summarized in part two of this series next month and is discussed comprehensively in *Form-Based Codes: A Guide for Planners, Urban Designers, Municipalities, and Developers*.

Form-Based Codes Do Not Regulate Use

While form-based coding uses form rather than use for its framework or organizing principle, FBCs are not silent on use and do include use tables. The use regulations simply become tertiary to the form standards instead of being the primary regulation, and they are simplified and vetted by the code writer so as not to compromise the intent of the FBC. The approach to use tables within FBCs will also be discussed in more detail next month.

The Urban-to-Rural Transect Is Not an Effective Organizing Principle

The primary misconception about the urban-to-rural transect is that it is too simplistic to capture the variety present in complex built environments. In reality, applications in Miami; Cincinnati; Mesa; El Paso, Texas; Birmingham, Alabama; and the code in progress for Beaufort County, South Carolina, clearly illustrate the complexity and effectiveness of the transect as a zoning tool and its ability to reinforce unique characteristics and patterns of a wide range of places. If the transect is used and presented effectively, with the support of photos and illustrations, community members will typically "get it" quite quickly.



Opticos Design, Inc.

This illustration of Flagstaff, Arizona's transect illustrates different contexts in the city that became the basis for its form-based zones.

State Laws Prohibit the Use of Form-Based Codes

Because FBCs look much different than Euclidean ordinances, many people assume that this new approach must be incompatible with existing state zoning enabling laws. While most enabling laws are still rooted in the 1926 Standard State Zoning Enabling Act (SSZEA), the SSZEA is not exclusively use based and does not show a preference for regulating use over form (Sitkowski and Ohm 2006).

COMMON MISTAKES TO AVOID

Common form-based coding mistakes range from those that are simple to define and are easily

corrected, to those that are more technical and relate to overall approach and methodology, and thus take more thought to carefully address. A group of these common mistakes, both easy and technical, are addressed in this issue, but the list will be continued next month in part two.

Using FBCs to Regulate Suburban Contexts

The primary intent of form-based coding is to effectively regulate walkable urban areas. When you try to use them to regulate drivable suburban areas (i.e., areas that are intended to remain drivable suburban areas) this will compromise the clarity and effectiveness of the code and possibly raise false expectations. This means that in a citywide application you will typically have a form-based system in place to regulate walkable urban or desired walkable urban areas (i.e., sprawl repair or greenfield development) and a refined Euclidean system to regulate drivable suburban areas effectively. In essence, this is the key to an effective hybrid code.

Confusing Other, Less Effective Zoning Approaches with Form-Based Coding

Because the practice of form-based coding is still relatively new and represents a major change in the methodology of zoning, it is often hard for communities to know what to ask for or what to look for in a consultant's experience. In addition, because form-based coding seems to be the latest "buzz" in zoning practice, almost every code project is being labeled form-based zoning or form-based coding, which threatens to distort and dilute the meaning of the concept. For example, FBCs are not design guidelines or graphical representations of existing Euclidean standards. And FBCs are not synonymous with any zoning district or ordinance that enables a mix of uses. (See table on pages 6 and 7.)

DISTINGUISHING AMONG DIFFERENT ZONING APPROACHES

The information below and the table supporting this article are intended to clarify and classify different zoning approaches to prevent further confusion about what an FBC is and to enable comparison for cities and code writers alike. These are generally organized from least to most comprehensive and effective.

Adding Graphics to an Otherwise Conventional, Use-Based Code

An FBC is not simply a conventional code with graphics added to it. Even though taking this step can make a document a bit easier to use and understand, it does not address the core problems that are inherent in almost every existing zoning code, which is their inability to effectively regulate urban form. Taking this step often confuses users because they think they are using a new code and then get frustrated when they realize the core problems have not been addressed. This is not a recommended approach.

Adding Design Guidelines Without Changing Base Zoning Districts

In this approach, the code writer is simply adding another layer of regulations or policy direction (depending upon how they are adopted) but not addressing the problems inherent in the existing zoning code, and when completed, the guidelines often conflict with the zoning standards, making it difficult to administer and confusing to users. Simply said, adding this additional layer of regulation decreases clarity and predictability. Meanwhile, a well-written FBC incorporates the elements that, in a Euclidean system, might historically be included in site planning guidelines and makes them integral to the zoning code.

Adding Mixed Use Districts to an Otherwise Conventional Use-Based Code

Starting in the mid- to late-1990s many communities added mixed use districts to their existing zoning codes in an attempt to make walkable, urban development easier and to facilitate neighborhood revitalization. The problem was that, in too many cases, these districts included proscriptive numerical dimensional standards and did not signal a clear intent on form. Furthermore, other suburban-oriented regulations in the code, such as parking and landscaping requirements, compromised the end result of these districts or limited their use by developers.

Reorganizing the Code and Adding Graphics

This method takes the first approach one step further by cleaning up administration and procedures and restructuring the code organization, in addition to adding graphics. This will make a code much easier to understand, but it is still not addressing the core problem of suburban DNA and tendencies of a code to incentivize auto-dependent development. Use is still the organizing principle. The first few projects will likely provide disappointing results after such a large coding effort. Such results only reinforce the misconception that built form cannot be regulated effectively and is best addressed in arbitrary design review meetings.

Integrating a Complete FBC Into an Otherwise Use-Based Code

This is an excellent approach when you do not have the budget or are not in a good position to do a complete code rewrite. This approach puts a framework in place for targeted application of a complete FBC, and if it is done correctly, it can grow to cover other parts of a city as the budget, political will, or other factors enable it. An example is Mesa's parallel FBC, which was written for initial application to its downtown to respond to the implementation of light rail but done in a way that could either be used by the city in future planning and coding efforts or by property owners of larger sites that met a certain set of criteria, such as a large grayfield site. What is often not understood about this approach is that it is not simply adding some new form-based standards or form-based zones but rather creating a complete, parallel code within an existing zoning code.

To be most effective, the FBC should be mandatory, replacing the zoning for one or more

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mapped districts. In states with strong private property rights concerns, a mandatory FBC effort may be politically infeasible. When a mandatory code is not possible, an optional FBC overlay may still be an effective alternative. In this approach, property owners have an option of developing under conventional zoning or under the FBC. At first glance, this may seem similar to a planned development district, but unlike a planned development, the FBC is mapped to one or more areas and does not require a rezoning. The future of these areas has been predetermined by the visioning and coding process and is not subject to site-by-site negotiation. The Columbia Pike FBC is an excellent example of this optional overlay approach.

Using Form as an Organizing Principle for the Zoning Code

This is the most comprehensive approach and, when done well, the most effective approach to form-based coding. In this approach, the table of contents of the code document is structured with a form-first philosophy. Every provision from the preexisting code is vetted for its applicability to the form-first operating system before it is transferred so that it does not compromise the intent. All regulations, including parking, landscaping, lighting, and signage, relate to context rather than to a specific use. This approach is perfect for a community that has made a strong commitment to promote smarter, more sustainable growth, transit-oriented development, or simply non-auto-dependent development that reinforces its unique character.

Miami 21, the citywide code for Miami, which received APA's 2011 National Planning Excellence for Best Practice award, is the most comprehensive application of this approach to date. Most of the city of is mapped with form-based zones. This was possible because a majority of the city is urban in character, and the process had strong support from then-Mayor Manny Diaz.

Livermore, California, used this approach to make infill a priority and to reinforce its commitment to promoting redevelopment. Even though the form-based zones were only mapped on a limited basis in Livermore, the system was in place to default to walkable urban development instead of making it the exception, reinforcing the city's smart growth policies and allowing the FBC to spread geographically in the future without any major changes or additional work on the code.

Flagstaff, Arizona, also used form as the organizing principle for its new code. Flagstaff's process replaced a problematic performance-based system that had a primary objective of protecting natural resources with a form-based approach that promotes appropriate urbanism, while still protecting natural resources.

This approach can work effectively in small towns as well. For example, Kingsburg, California, is an agricultural community in California's Central Valley with a population of approximately 11,500 people. It adopted this approach successfully within its zoning code to preserve its small-town character.

In the cases of Livermore, Flagstaff, and Kingsburg, the suburban parts of the city, where there was no intent to change them, is still mapped with used-based zones; these zones reside on the map next to form-based zones. In addition, the cleaned-up use-based regulations reside next to the form-based regulations in the code. If the city decides to transform these suburban areas into walk-

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Form-Based Codes

Form-Based Codes

Typical Approaches to Zoning Urban Form (from least to most effective)	What Should this Approach be Called?	Organizing Principle	New Components Create and Included
1. Adding graphics to a Euclidean, use-based code	Graphics-Based Code	Use	Primarily additional graphic and tables, content has mino changes only
2. Adding design guidelines/ site planning guidelines to a Euclidean, use-based code	Design Guidelines or Design Standards	Use	Components similar to FBC components may be created but they do not replace the co so they may not be as careful vetted and may create conflic within the zoning code
3. Adding mixed use zones to a Euclidean, use-based code	Targeted Mixed Use Zone Application	Use typically, sometimes form	New base zones and zone standards only
4. Adding graphics, reorganizing code, cleaning up administration, and minor changes to development standards	Code Clean Up and Re-organization	Use	Mostly just translating existi information into tables and creating drawings to suppor existing code information
5. Optional Form-Based Code overlay	Form-Based Code Overlay	Form	All typical FBC elements included, process rethought f FBC application
6. Integrating a complete form-based code within a preexisting zoning code	Parallel Form-Based Code	Form for FBC section, use for the rest of the preexisting code	All typical FBC elements included, process and all gene standards (parking, landscapi etc.) rethought for FBC application
7. Using form as an organizing principle for the entire zoning code and using form-based code components as the driver for your table of contents	Citywide Form-Based Code	Form	All typical FBC elements included, process and all gene standards (parking, landscapi etc.) rethought for FBC application; administration a procedures, variances, etc., a all rethought to support the F

Is the verall Code eorganized r Usability?	Likely Cost Range	Considerations for this Approach
Not in this example	Low, primarily because it is a graphic design-usability exercise only	This is completely ineffective and should be avoided. This is what you will often get if your budget is too low for a true FBC: It will look good, but will not produce predictable results. Does not address obstacles for good development or process-related issues inherent in most zoning codes.
No	Low, primarily because it does not address the problems with underlying zoning	Mostly ineffective due to typical issues inherent in existing code that are not addressed; may even contradict zoning. Adds another layer of regulations that confuses intent and negatively impacts usability and administration.
No	Low, primarily because this approach entails creating only new base zones	Effectiveness depends highly on quality and clarity of existing code and development review process. If administration and the code document structure are good, detailed visioning is completed, and the mixed use zones are not oversimplified, this can begin to show good results. Existing parking, use tables, landscaping standards, etc., must be vetted.
Yes	Medium to high depending on scale of city or county	Addresses many of the issues above but ultimately still has use as an organizing principle, which limits the effectiveness of the code and stops it short of being an FBC. Does not typically complete documentation and analysis of place to extract the DNA that becomes the basis for the code but rather uses existing zone standards as starting point and makes changes to those.
No	Low to medium, depending primarily on extent of visioning completed	Administration, parking, landscaping, and all other elements within code must be vetted and coordinated with intent of the FBC and potentially included in the FBC and replaced when the overlay is triggered.
Sometimes	Medium, primarily due to the fact that a complete, parallel code is being created to replace the existing code in targeted areas	Administration, parking, landscaping, and all other elements within code must be vetted and coordinated with intent of the FBC Division. If you are doing a complete code rewrite and you choose this approach, you are writing two complete, parallel code documents, which is not a good use of resources. This approach is still sending a message that the default is drivable suburban development and that FBCs are the exception.
Yes	High, slightly higher than #4 due to charrettes for FBC Focus Areas, extensive documentation and analysis phase, and careful vetting of all standards	In this approach, the structure of the entire zoning code is completely rethought, a new operating system is established, and thus the entire table of contents of the code document is structured with a form-first philosophy. Every last bit of content from the preexisting code is vetted for its applicability to the form-first operating system before it is transferred so that it does not compromise the intent. This approach is perfect for a city that has made a strong commitment in its city policies to promote smarter, more sustainable growth. Let Euclidean zoning regulate drivable suburban contexts, and the FBC regulate walkable urban contexts. It is called a citywide form-based code not because the entire city has form-based coding applied, but rather the entire city has been assessed and the FBC applied to where it makes sense. The FBC application can then easily spread.

able urban places, it can apply the form-based zones to these areas, after visioning, without requiring a new coding effort. Note that it is best to call these hybrid codes, not hybrid FBCs, because it is not the FBC that is hybrid but rather the entire code because it has both form-based and Euclidean components.

CONCLUSIONS

The application and interest in form-based coding has exploded across disciplines since *Zoning Practice*'s introduction to the topic in 2004. This is largely due to the ineffectiveness of a Euclidean zoning to address the demands of 21st century cities, towns, and regions for walkable urbanism, diverse housing choices, more sustainable development patterns, and the desire to reinforce unique community character. The FBC, when applied correctly, has proven to be an extremely effective zoning tool for addressing these demands.

Stay tuned. The next issue of *Zoning Practice* will cover more common mistakes to avoid in form-based coding, including omitting an extensive documentation and analysis phase, not refining land-use tables, using the urban to rural transect incorrectly, not graphically assessing your existing zone standards, using too many graphics, and not linking your form-based coding and comprehensive planning efforts.

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ZONING PRACTICE
AMERICAN PLANNING ASSOCIATION

205 N. Michigan Ave.
Suite 1200
Chicago, IL 60601–5927

1030 15th Street, NW
Suite 750 West
Washington, DC 20005–1503

CAN YOU DISTINGUISH BETWEEN A FORM-BASED CODE AND ITS IMITATORS?

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