

Zoning Bulletin

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Preemption—Medical marijuana dispensary operator challenges city ordinances banning medical marijuana dispensaries

Dispensary operator claims city ordinances are preempted by California's Compassionate Use Act and Medical

Contributors

Corey E. Burnham-Howard

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Marijuana Program Act

Citation: *Conejo Wellness Center, Inc. v. City of Agoura Hills*, 154 Cal. Rptr. 3d 850 (Cal. App. 2d Dist. 2013)

CALIFORNIA (03/28/13)—This case addressed the issue of whether city ordinances banning medical marijuana dispensaries were preempted by California’s Compassionate Use Act (“CUA”) and/or California’s Medical Marijuana Program Act (“MMPA”). It also addressed whether town ordinances banning medical marijuana dispensaries deprived the dispensary operator of a vested property right.

The Background/Facts: Beginning in June 2006, Conejo Wellness Center, Inc. (“Conejo”) was a California cooperative corporation that operated as a nonprofit collective engaged in the distribution of medical marijuana to its members. Conejo operated in a Business Park Manufacturing District in the City of Agoura Hills (the “City”).

Under the City’s zoning ordinance, a “medical marijuana dispensary” was not listed as a permitted use within any commercial district. As such, it was a prohibited use under the zoning ordinances.

In September 2008, the City adopted ordinance No. 08-355, which added § 9660 to the Agoura City Hills Municipal Code (“AHMC”). Section 9660 expressly stated that the operation of a medical marijuana dispensary was not a permitted use anywhere in the City. Under the AHMC, a violation of the ban on medical marijuana dispensaries was punishable by six months in jail or a \$1,000 fine or both.

In October 2010, the City adopted Ordinance No. 10-379, which added § 4125 to the AHMC. Section 4125 expressly prohibited any medical marijuana dispensary from receiving “compensation” for the distribution of medical marijuana. Ordinance No. 10-379 also made other changes to the AHMC, including: requiring nonprofit businesses to obtain an annual business registration permit prior to operation; and expressly prohibiting operation of a business without a valid business permit.

In November 2010, Conejo applied for a 2011 business registration permit. The permit was denied because medical marijuana dispensary was not a permitted use under the AHMC.

Subsequently, Conejo filed a legal complaint seeking injunctive and declaratory relief against the City based on Ordinance No. 08-355 and Ordinance No. 10-379. Among other things, Conejo argued that California’s CUA and MMPA preempted Ordinance No. 08-355, parts of Ordinance No. 10-379, and the various AHMC provisions that made violation of those ordinances either misdemeanors or public nuisances subject to abatement.

The City filed a cross-complaint seeking both declaratory and injunc-

tive relief. The City sought a permanent injunction to abate Conejo's continued operation as a public nuisance based on Conejo's: failure to obtain proper permits; failure to obtain a valid business license; violation of Ordinance No. 08-355; and violation of Ordinance No. 10-379.

The trial court entered judgment against Conejo on both Conejo's complaint and on the City's cross-complaint. The court permanently enjoined Conejo from "selling, providing, or otherwise making available marijuana at or from" its location or any other location within the City.

Conejo appealed.

DECISION: Affirmed.

Among other things, the Court of Appeal, Second District, Division 8, California, held that the City's ordinance banning medical marijuana dispensaries was not preempted by the CUA or the MMPA.

In so holding, the court explained the law of preemption. The court explained that local legislation is preempted by state law and is therefore void when the local law: (1) duplicates state law; (2) contradicts state law; or (3) enters an area or field fully occupied by state law. The court further explained: "Local legislation is duplicative when it is coextensive with state law. . . . It is contradictory when it is 'inimical to or cannot be reconciled with state law.' . . . [It] enters an area or field that is 'fully occupied' by state law when the Legislature has either (1) expressly manifested its intent to fully occupy the area or (2) impliedly has done so."

Here Conejo had argued: (1) the CUA and MMPA created a state right to cultivate, distribute, or otherwise obtain marijuana collectively, and thereafter to possess and use it, for medical purposes; and (2) the AHMC, through various provisions, conflicted with that right by prohibiting and/or punishing its exercise.

The court rejected Conejo's argument. The court held that although both Ordinance No. 08-355 (AHMC § 9660) and Ordinance No. 10-379 (AHMC § 6800) either directly or indirectly prohibited Conejo's operation as a medical marijuana dispensary, neither the CUA nor the MMPA created the right to distribute marijuana, and therefore the Ordinances were not preempted by the CUA or MMPA.

The court explained that the CUA immunized qualified patients and caregivers from criminal prosecution; it did not create a constitutional right to obtain marijuana or allow the sale or nonprofit distribution of marijuana by medical marijuana cooperatives. The CUA, then, "does not create a 'right' to cultivate, distribute, or otherwise obtain medical marijuana collectively," said the court. "Rather, it simply provides two specifically identified groups of persons with a limited defense to two specific state criminal statutes. It does not mention, let alone authorize,

medical marijuana collectives or dispensaries.” Moreover, the court found that the CUA “does not expressly prohibit further legislation in the area of medical marijuana use,” but in fact “expressly acknowledges the potential validity of other legislation intended to prevent or regulate related conduct that might endanger the general citizenry.”

Accordingly, the court concluded that the referenced City ordinances were not coextensive with the CUA and therefore did not duplicate it. The court also found that since the CUA does not create a right to cultivate, distribute, or otherwise obtain medical marijuana collectively, local prohibition of such conduct does not contradict it. Also, the court found that, given its limited scope and express recognition of the validity of additional legislation in the area, the CUA was not intended explicitly or implicitly to occupy fully the entire field of medical marijuana use.

The court also explained that although the MMPA extends immunity from prosecution to include those who “collectively or cooperatively . . . cultivate marijuana for medical purposes,” it similarly does not affirmatively create any right, constitutional or otherwise, to cultivate or distribute medical marijuana through collectives or dispensaries. Nor, said the court, does the MMPA expressly forbid local regulation in the area of medical marijuana use. In fact, the MMPA expressly permits “civil and criminal enforcement” of local ordinances “that regulate the location, operation, or establishment of a medical marijuana cooperative or collective.”

The court concluded that “none of the three bases for preemption exist[ed] here”: The [City] ordinances were not coextensive with and therefore [did] not duplicate the MMPA. Further, the [City] ordinances [did] not contradict the MMPA [since the MMPA did not prohibit the City’s ban of dispensaries].” Finally, the court held that the MMPA does not preempt by field occupation the City ordinances; the MMPA, in fact, contemplated additional local regulation of medical marijuana.

See also: *Nordyke v. King*, 27 Cal. 4th 875, 118 Cal. Rptr. 2d 761, 44 P.3d 133 (2002).

See also: *City of Claremont v. Kruse*, 177 Cal. App. 4th 1153, 100 Cal. Rptr. 3d 1 (2d Dist. 2009).

Case Note:

Conejo has also asserted that the permit requirements of Ordinance No. 10-379 deprived it of a vested property right in the continued operation of a dispensary from its leasehold, and thus violated its “substantive and procedural due process rights.” The court rejected this argument based on: the fact that Conejo’s operation of the collective medical marijuana dispensary was never a lawful use within the City’s Manufacturing District; and on the court’s de-

termination that neither the CUA nor the MMPA creates a right to operate a collective medical marijuana dispensary.

Case Note:

The court also rejected Conejo's assertion that Ordinance No. 10-379 was void because the City did not comply with notice and other requirements under the state statute—Government Code 65853—governing enactments and amendments of zoning ordinances. The court held that § 65853 was inapplicable to Ordinance No. 10-379 because Ordinance No. 10-379 was neither a zoning ordinance nor an amendment of a zoning ordinance. (Again, Ordinance No. 10-379 required nonprofit entities to obtain annual business registration permits, banned medical dispensaries from receiving permits and from receiving compensation from the distribution of medical marijuana.)

Use—School district seeks to install solar energy field as “accessory use”

Zoning Hearing Board denies approval, saying proposed use is not “customarily incidental” to a school

Citation: Northampton Area School Dist. v. Zoning Hearing Bd. of Tp. of Lehigh, 2013 WL 1409883 (Pa. Commw. Ct. 2013)

PENNSYLVANIA (04/09/13)—This case addressed the issue of whether a solar energy field was permitted as of right on a public school property under a local zoning ordinance that allowed solar energy units as a permitted accessory use in all zones “subject to the requirements of that zone.”

The Background/Facts: The Northampton Area School District (the “School District”) owned 19 acres of land in the Agricultural/Rural Residential (“A/RR”) Zoning District of Lehigh Township (the “Township”) (the “Property”). The principal use of the Property was “public education.” The “Lehigh Elementary School” (the “School”) was located on the Property.

In October 2010, the School District and Alliance Energy Group, LLC (hereinafter, collectively, the “School District”) applied to the

Township's Zoning Officer for approval to install a solar energy field on four acres on the Property. The proposed solar energy field would consist of 7,000 solar energy panels, divided into 280 individual units, with each complete unit being approximately 13.5 feet wide and 26 feet long. The School District intended to use the solar energy panels to generate electric power to the School. The School District maintained that the proposed solar energy field would: allow the School District to save between approximately \$2 and \$4 million over a 20-year term in lower energy costs; provide an educational component to students; comply with all building codes; comply with all appropriate setbacks and requirements of the A/RR Zoning District; and not cause any "deleterious effects on the surrounding neighborhoods."

The Zoning Officer denied the application and opined that the proposed use constituted a "second commercial principal use" of the Property.

The School District appealed to the Township's Zoning Hearing Board (the "ZHB"). The School District contended that the proposed use was not a second principal use. They argued that the use was a permitted "accessory use" under § 180-25(A) of the Township's Zoning Ordinance. Section 180-25(A), entitled "Accessory Uses—Alternative Energy Systems," provided: "Solar energy units shall be permitted in any zone and subject to the requirements of that zone."

The ZHB agreed that the proposed use did not constitute a "second principal use." However, the ZHB rejected the School District's argument that § 180-25(A) of the Zoning Ordinance permitted a solar energy field as an accessory use "as of right" in the A/RR Zoning District. The ZHB reasoned that § 180-25(A) allowed solar energy units subject to the "requirements of the zone." Since public schools were permitted by special exception in the A/RR Zoning District, the ZHB looked at the Zoning Ordinance's special exception standards for public schools—specifically § 180-94(G), which permitted "accessory uses customarily incidental" to a public and private school. The ZHB ultimately determined that solar fields were not an "accessory use customarily incidental" to a public or private school and therefore was not a permitted "accessory use."

The School District appealed. The common pleas court affirmed the ZHB's opinion.

The School District again appealed. Among other things, on appeal, the School District argued that their proposed energy field was permitted as of right on the Property under § 180-25(A) of the Zoning Ordinance which specifically designated solar energy units as an "accessory use" allowed in every Zoning District.

DECISION: Reversed, and matter remanded.

The Commonwealth Court of Pennsylvania agreed with the School

District. It found that the plain language of § 180-25(A) of the Zoning Ordinance stated that solar energy units were permitted as an “accessory use” in any zone. Under the Zoning Ordinance, “accessory use” was defined as “[a] subordinate use or building customarily incidental to, and located on the same lot occupied by, the main use or building.” Thus, by stating that solar energy was a permitted “accessory use,” the Township had already legislatively determined that solar energy units were “customarily incidental” to every principal use in every Zoning District. By further undertaking the inquiry as to whether the use was “customarily incidental” to a school, the ZHB erred, said the court.

Addressing the fact that solar energy uses were a permitted “accessory use” so long as they meet the “requirements of the zone,” the court noted that the Ordinance did not define “requirements of the zone.” The court however found it clear that such language referred to the height, area, setback and coverage standards applicable to accessory uses in each particular zone. By all accounts, the School District’s proposed use had met those standards.

Given that solar energy units were permitted as an accessory use in the A/RR Zone and that the School District’s proposed solar field met height, area, setback and coverage standards applicable to accessory uses in the A/RR Zone, the court remanded the matter to the ZHB with direction to approve the School District’s application to install the solar energy field as an “accessory use” to the School.

Case Note:

In its decision, the court noted that it found ZHB’s interpretation—that the solar energy field use must be “customarily incidental” to the School—would: “force landowners wishing to further the intent of § 180-25(A) [—which the court found was to encourage on-site generation of electric power from this alternative energy—] to first demonstrate that such alternative energy uses are ‘customarily incidental’ to their underlying use, which w[ould] be difficult, if not impossible, to show given [the] relative newness and dearth [of solar energy fields].”

Time for Proceedings/Interpretation of Zoning Regulations—Town says deck built four years prior violates zoning code, must be removed

Homeowner contends state statute applies a three-year statute of limitations on enforcement actions on nonconforming buildings

Citation: *Tine v. Zoning Bd. of Appeals of Town of Lebanon*, 308 Conn. 300, 2013 WL 1500857 (2013)

CONNECTICUT (04/23/13)—This case addressed the issue of whether a deck attached to a residential property is a “building” as that term is used in Connecticut General Statutes § 8-13a(a)—which applies a three-year statute of limitations to enforcement actions on buildings that have existed as nonconforming for more than three years without an action to enforce regulations.

The Background/Facts: In 1999, Dean V. Tine and Robin Tine (the “Tines”) acquired lakefront property in the town of Lebanon (the “Town”). The Tines obtained a variance from the Town’s zoning board of appeals (the “Board”) to construct a single-family house on the property. The variance allowed the house to extend 35 feet into what otherwise would have been a prohibited setback area, which was designed to protect the water quality of the lake.

After obtaining the variance, the Tines applied for and received a zoning permit and a building permit from the Town to construct the house. The construction plans submitted to the Town did not include a deck.

In 2003, the Tines completed construction of the house.

In April and May 2004, the Tines constructed a deck. The deck connected to the back of the house and included stairs for ingress and egress to the house through doors. The Tines did not apply for or receive the required building permits for the deck, nor did they notify the Town of the deck’s construction.

In the fall of 2008, the Tines sought a certificate of zoning compliance and a certificate of occupancy from the Town in connection with a potential sale of the property. The Zoning Enforcement Officer (“ZEO”) inspected the property and discovered that the deck violated

the Town's zoning regulations because it extended beyond the permitted setback.

The Tines sought a variance for the deck. The Board denied the variance request.

In January 2009, the ZEO issued a cease and desist order to the Tines. The order required the Tines to abate the setback violation, presumably by removing the deck.

The Tines appealed to the Board. They argued that the ZEO was barred from pursuing the enforcement action against them because the violation had existed for more than three years at the time the cease and desist order was issued. Therefore, they contended, the statute of limitations set forth in Conn. Gen. Stat. § 8-13a(a) had run.

Section 8-13a(a) provides in relevant part: "When a building is so situated on a lot that it violates a zoning regulation of a municipality which prescribes the location of such a building in relation to the boundaries of the lot . . . and when such building has been so situated for three years without the institution of an action to enforce such regulation, such building shall be deemed a nonconforming building in relation to such boundaries"

The Tines contended that the deck was a "nonconforming building" under the statute and that, therefore, the three-year statute of limitations applied and the notice of violation and cease and desist order was invalid.

The superior court agreed.

The Board and ZEO sought a certification to appeal to the Appellate Court. The Supreme Court transferred the appeal.

DECISION: Reversed, and matter remanded.

The Supreme Court of Connecticut held that the deck was not a "building" under the Conn. Gen. Stat. § 8-13a(a) and that, therefore, the three-year statute of limitations did not apply and the notice of violation and cease and desist order was valid.

In so holding, the court interpreted § 8-13a(a). Finding § 8-13a(a) did not define "building," the court looked to the definition of "building" in dictionaries. Generally, the court found that "building" was defined as a structure with walls and a roof. The court also found further support for a differentiation between a "building" and a "structure" in the fact that Connecticut statutes were "replete with provisions that distinguish between 'buildings' and 'structures.'" Accordingly, because § 8-13a (a) applies only to "buildings" and not all "structures," defining "building" to include all "structures" would produce "absurd and unworkable results," determined the court.

The court therefore concluded that the plain meaning of the term "building" as it is used in § 8-13a (a) refers to "an edifice designed to

stand permanently, with a roof and walls.” The court found it undisputed that the Tines’ deck had neither walls nor a roof. Thus, the court concluded that the Tines’ deck was not a “building” under the statute, and therefore was not entitled to protection under the three-year statute of limitations on enforcement actions for nonconforming buildings.

See also: *Benson v. Zoning Bd. of Appeals of Town of Westport*, 89 Conn. App. 324, 873 A.2d 1017 (2005).

Case Note:

The Tines had also argued that even if the deck was not a “building,” it was nevertheless covered by § 8-13a(a) because it was “an integral and necessary part of the house.” The court disagreed. The court said if the deck was an essential component of the house, it would have been included in the construction plans originally submitted to the Town. Additionally, the court noted that if the deck had been deemed to be part of the house and exempt from an enforcement action, notwithstanding the fact that the town never approved the deck’s construction, property owners would be incentivized to omit such structures from construction plans, particularly when a variance is sought to accommodate construction of a house, and then commence construction of the deck after approval of the construction plans for the house has been received.

Zoning News from Around the Nation

IDAHO

The state House of Representatives is considering SB 1192a. The bill, which was passed by the Senate, would “exempt a state parking garage project near the Capitol from Boise city planning and zoning requirements.”

Source: *The Spokesman-Review*; <http://www.spokesman.com>

MICHIGAN

The state Senate recently approved legislation that would impart “tougher penalties” on owners of blighted and neglected property who do not pay their fines. Under the bills, “if a person has more than \$1,000 unpaid fines on a second blight violation, he or she could face misdemeanor charges punishable by up to 93 days in jail, a fine up to \$500, or both. If the owner has three or more blight violations, the penalty is up to a year in jail.” The bills now head to the House for consideration.

Source: *CBS Detroit*; <http://detroit.cbslocal.com>

NEW YORK

A proposed state law, Assembly Bill 5360 and Senate Bill 2384, would reportedly “exempt agricultural facilities from local zoning laws.” Under the proposed state regulations, “any association of farmers may lease their grounds for exhibitions and events” and “provisions of any special or local law or municipal ordinance . . . shall not apply to any exhibition or entertainment” held on the grounds.

Source: *Daily Freeman*; www.dailyfreeman.com

TEXAS

The state Senate approved legislation that “would provide zoning protection to Austin neighborhoods when the state develops its land with public-private partnerships.” One bill would require “the state to submit plans for public-private projects on state land—other than the Capitol complex—to municipal zoning,” allowing for appeal to a seven-member board that includes a majority of state officials.

Source: *American-Statesman*; www.statesman.com

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Preemption—Town's zoning amendment bans hydrofracking for oil, natural gas

Zoning amendment is challenged as being preempted by state statute regulating the oil and gas industries

Citation: *Norse Energy Corp. USA v. Town of Dryden*, 2013 WL 1830800 (N.Y. App. Div. 3d Dep't 2013)

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NEW YORK (05/02/13)—This case addresses the issue of whether New York’s Oil, Gas and Solution Mining Law (“OGSML”) preempts municipal zoning ordinances banning all activities related to the exploration for, and the production or storage of, natural gas and petroleum.

The Background/Facts: In August 2011, the Town of Dryden (the “Town”) amended its zoning ordinance to “ban all activities related to the exploration for, and the production or storage of, natural gas and petroleum” (the “Zoning Amendment”). The Zoning Amendment occurred in the midst of growing local concern over the proposed use of high volume hydraulic fracturing, commonly known as “hydrofracking,” to recover natural gas from underground shale deposits.

Anschutz Exploration Corporation (“AEC”) was a driller and developer of oil and natural gas wells. AEC owned leases covering approximately 22,200 acres of land in the Town. Following the adoption of the Town’s Zoning Amendment, AEC brought a legal action for declaratory judgment. AEC asked the court to declare that the Town’s Zoning Amendment was invalid on the ground that it was preempted by the OGSML (New York Environmental Conservation Law 23-0301 to 23-2723). AEC pointed to the supersession clause in the OGSML. That clause provides: “[t]he provisions of [the OGSML] shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law.” (ECL 23-0303[2].)

The supreme court issued summary judgment in favor of the Town. It declared that that the Zoning Amendment was not preempted by the OGSML.

AEC appealed.

DECISION: Affirmed.

The Supreme Court, Appellate Division, Third Department, New York, held that the OGSML does not preempt, either expressly or impliedly, a municipality’s power to enact a local zoning ordinance banning all activities related to the exploration for, and the production or storage of, natural gas and petroleum within its borders.

In so holding, the court explained that local government power to enact zoning laws may be limited by the Legislature’s express or implied intent to preempt such laws. Here, the court found that the OGSML neither expressly nor impliedly preempted the Town’s Zoning Amendment.

Addressing express preemption, the court analyzed the OGSML’s supersession clause. The court found that the supersession clause prohibits municipalities from enacting laws or ordinances “relating to the *regulation* of the oil, gas and solution mining industries” (ECL 23-0303[2]) (emphasis added). The court said that while the Town’s Zoning Amendment would have an incidental effect upon the oil, gas, and solution mining industries, it did not regulate the details or procedure of the oil, gas, and solution mining industries. The court found the Zoning Amendment did not conflict

with the state's interest in establishing uniform procedures of the operational activities of those industries, but simply established permissible and prohibited uses of land within the Town for the purpose of regulation land generally. Thus, the court held that the OGSML supersession clause did not expressly preempt the Town's Zoning Amendment. More generally, the court concluded that the OGSML supersession clause: "does not serve to preempt a municipality's authority to enact a local zoning ordinance prohibiting oil, gas and solution mining or drilling within its borders."

The court also concluded that the Town's Zoning Amendment was not impliedly preempted by the OGSML. The court found that the Zoning Amendment "neither conflict[ed] with the language nor the policy of the OGSML." The court found that the Zoning Amendment dictated in which, if any, districts, drilling could occur, while the OGSML instructed operators as to the proper spacing of well units within those districts in order to prevent waste. The court also found that while the OGSML sought to avoid waste (i.e., inefficient and ineffective drilling operations), that did not equate to an intention to require oil and gas drilling operations to occur in each and every location where such resource is present, regardless of the land uses existing in that locale. "Indeed," noted the court, "the policy of the OGSML explicitly seeks to protect the rights of 'all persons including landowners and the general public'—not just the owners of oil and gas properties, such as petitioner (former Conservation Law § 70; L 1963, ch. 959), a goal which is realized when individual municipalities can determine whether drilling activities are appropriate for their respective communities."

Accordingly, the court concluded that the Town's Zoning Amendment, prohibiting the activity of hydrofracking, did not conflict with the state Legislature's intent via the OGSML to ensure that, where oil or gas drilling occurs, the operations are as efficient and effective as possible.


See also: *Frew Run Gravel Products, Inc. v. Town of Carroll*, 71 N.Y.2d 126, 524 N.Y.S.2d 25, 518 N.E.2d 920 (1987) (similarly holding that New York's Mined Land Reclamation Law did not preempt a town's zoning law which established a zoning district where sand and gravel operations were not a permitted use).

Case Note:

During the pendency of the appeal, AEC assigned its interest in certain oil and gas leases in the Town to Norse Energy Corporation USA ("Norse"). Norse was thereafter substituted in the proceeding.

Case Note:

The Supreme Court did hold as invalid a provision of the Town's Zoning Amendment that invalidated permits issued by other local or state agencies.



Case Note:

In its decision, the court also concluded that Dryden Resources Awareness Coalition ("DRAC")—an association of residents and landowners in the Town—did not have standing to intervene in the matter. The court found that DRAC had failed to demonstrate a substantial interest in the outcome of the action different from other residents of the Town.

Standing—After ZBA grants variance to competitor, supermarket challenges decision

Town argues supermarket lacks standing to appeal because it failed to show proximity or injury


Citation: *Hannaford Bros. Co. v. Town of Bedford*, 2013 WL 1769794 (N.H. 2013)



NEW HAMPSHIRE (04/25/13)—This case addressed the issue of whether a commercial business that operated within four miles of its competitor's proposed site had standing to challenge the grant of a variance to the competitor.

The Background/Facts: Hannaford Brothers Company ("Hannaford") owned and operated a 36,541-square-foot supermarket in a commercial district on Route 101 in the Town of Bedford, New Hampshire (the "Town"). Hannaford's supermarket had been approved in November 2006, shortly after the Town enacted a zoning ordinance amendment restricting the size of any single building in the commercial district to 40,000 square feet (the "Ordinance").

Retail Management and Development, Inc. ("RMD") developed supermarkets for Demoulas Super Markets, Inc. RMD sought to develop a 78,332-square-foot supermarket in the Town's commercial district on Route 114. The site of RMD's proposed supermarket was 3.8 miles from Hannaford's supermarket.



In November 2010, RMD applied to the Town's Zoning Board of Adjustment ("ZBA") for a variance to exceed the Ordinance's 40,000-square-foot restriction. The ZBA granted the variance. In doing so, the ZBA found, among other things, that: the "spirit of the ordinance" was intended to limit the size of buildings on Route 101, but not on Route 114, where RMD sought to build. It also found that: the area on Route 101 where Hannaford's supermarket was located could not support buildings

with a footprint larger than 40,000 square feet due to the limited depth of the commercial zone along Route 101; there was a desire to maintain the "rural character" of the area and to avoid "massing," or visual takeover of the area; and RMD's 17-acre parcel on Route 114 was a "unique piece" of commercially zoned land surrounded by industrial properties.

Hannaford had objected to RMD's variance application. After the ZBA granted the variance, Hannaford sought a rehearing. The ZBA denied the rehearing request, finding that Hannaford was not a "person directly affected" by its decision and, thus, lacked standing (i.e., the legal right) to move for rehearing.

Hannaford appealed.

DECISION: Affirmed.

The Supreme Court of New Hampshire also concluded that Hannaford lacked standing to challenge the ZBA's grant of a variance to RMD.

In so concluding, the court noted that, under New Hampshire statutory law, RSA 677:4, "[a]ny person aggrieved" by an order of a zoning board of adjustment may petition the superior court for review. In other words, if Hannaford was found to be a "person aggrieved," it would have standing to challenge the ZBA's grant of the variance to RMD.

The court explained that a "'person aggrieved' includes any party entitled to request a rehearing under RSA 677:2." Under RSA 677:2, a person entitled to apply for rehearing includes: "any party to the action or proceedings, or any person directly affected thereby." Here, Hannaford was not a "party to the action"; thus, the court considered whether Hannaford was a "person directly affected" by the ZBA's decision. The court looked to whether Hannaford had "some direct, definite interest in the outcome of the [decision to grant the variance]."

The court further explained that whether Hannaford had an interest that was "sufficient to confer standing" required an analysis of the following factors: (1) the proximity of Hannaford's property to RMD's site; (2) the type of change proposed; (3) the immediacy of the injury claimed; (4) Hannaford's participation in the administrative hearings; and (5) "any other relevant factors" bearing on whether Hannaford had a direct, definite interest in the variance request.

Here, the court found that: (1) because Hannaford's supermarket was located 3.8 miles away from RMD's development site, it lacked proximity; (2) the type of change proposed by RMD was substantial; (3) Hannaford failed to allege any concrete injury to its particular property; (4) Hannaford did actively participate in the ZBA's hearing; and (5) Hannaford failed to show how the ZBA's decision had directly and specifically affected its own rights.

In regard to the third factor, Hannaford had argued that ZBA's comparison of Hannaford's location in the district to RMD's proposed location established sufficient injury to confer standing. The court rejected this argument. The court pointed out that the ZBA's comparison of the two

properties was made under its required examination of the character of the locality in determining whether the variance would be consistent with the “spirit of the ordinance.” The court also noted that the statutory mandate limits standing to persons “directly affected” by the ZBA’s decision (See RSA 677:2,;4). It also found that Hannaford’s “generalized interest” in the outcome of the ZBA’s proceeding was insufficient.

Hannaford had also argued that it suffered a “direct injury” because the ZBA’s decision allowed for “unfair or illegal” competition—caused by the ZBA’s grant to RMD of a variance from a “generally-applicable” zoning ordinance. The court noted that, in effect, Hannaford was arguing that any business should be permitted to challenge the validity of any ZBA decision to grant a variance to a competitor. The court rejected such a standard, saying that the “appeal of a ZBA decision is not a weapon to be used to stifle business competition.”

In conclusion, the court held that, although the second and fourth factors weighed in favor of standing, because Hannaford lacked proximity and failed to allege any concrete injury to its particular property as a result of the ZBA’s determination, the factors, on balance, did not support Hannaford’s standing to appeal.

See also: *Weeks Restaurant Corp. v. City of Dover*, 119 N.H. 541, 404 A.2d 294 (1979).

See also: *Nautilus of Exeter, Inc. v. Town of Exeter*, 139 N.H. 450, 656 A.2d 407 (1995).

First Amendment—City zoning ordinances restrict location options for adult entertainment businesses

Prospective adult club owner argues insufficient available sites remain in violation of the First Amendment

Citation: *Lund v. City of Fall River, MA*, 2013 WL 1731263 (1st Cir. 2013)

The First Circuit has jurisdiction over Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

FIRST CIRCUIT (MASSACHUSETTS) (04/22/13)—This case addressed the issue of whether city ordinances restricting the location of adult entertainment businesses provided reasonable alternative avenues of communication so as to withstand a First Amendment challenge.

The Background/Facts: Gary Lund (“Lund”) sought to open an adult entertainment business—“Club Martinique”—at a location in an Industrial

District in the City of Fall River (the "City") (the "Site"). Under the City's zoning ordinance, adult entertainment providers had to obtain a "special permit." The special permit would only be granted to applications that met a variety of zoning conditions.

Lund applied to the City for a special permit. The City denied his application because: (1) the proposal would have violated City Zoning Ordinance § 86-88, which placed requirements on parking spaces and landscaping; and (2) the proposed site was within an Industrial District and § 86-201 ordinance forbid adult entertainment on a site within an Industrial District.

Lund appealed to the Zoning Board of Appeals (the "ZBA") for a variance from the ordinances. The ZBA denied Lund's variance request.

Lund appealed to court. He alleged that the City's ordinances—§§ 86-88 and 86-201—violated the First Amendment of the United States Constitution (i.e., freedom of speech) because they denied him "a reasonable opportunity and accommodation to open, and operate within the City, an adult entertainment club."

The district court found that 28.53 (0.24%) of the City's developable acres, on eight separate sites, were available as adult entertainment venues. The court held that this provided Lund with reasonable room to exercise his protected expressive right. As such, the court concluded that the ordinances did not violate the First Amendment. The court entered judgment for the City.

Lund appealed.

DECISION: Affirmed.

The United States Court of Appeals, First Circuit, held that the City ordinances did not violate the First Amendment.

The court explained that, as time, place and manner regulations, the ordinances would survive the First Amendment challenge if they were found to be: (1) content neutral; (2) advanced a substantial governmental interest; and (3) left reasonable means of commercial adult activity as an alternative to their restrictions.

Lund had conceded that the ordinances were content neutral and that the City's interest was substantial. So the court looked at whether the land available in the City for adult entertainment business use (i.e., that land which complied with the zoning ordinances) allowed for "reasonable alternative avenues of communication." More specifically, the court looked to "multiple factors," including: "the percentage of acreage within the zone [for adult business use] compared [with] the acreage available to commercial enterprises" and "[t]he number of sites available to adult entertainment businesses."

Lund had contended that the district court had erred in finding there was 28.53 acres on eight sites "available" for adult entertainment. He argued that the sites that had long-term leases or required costly redevelopment should have been excluded from that tally of "available" sites, thus greatly

diminishing the quantity of land “available.” The First Circuit court disagreed. It said that it could look only at the restrictions imposed by the ordinances, not to the market effects of other people’s commerce or the economics of site clearance. Whether it would make sense for Lund to finance a costly redevelopment or to pay what current tenants would demand to break their leases were simply private business considerations; not facts subject to constitutional analysis. In other words, the fact that Lund had to fend for himself in the real estate market, on an equal footing with other prospective purchasers and lessees, did not give rise to a First Amendment violation, said the court.

The court concluded that, although only 0.24% of the City’s developable acres, on eight separate sites, remained a possible option for Lund’s adult entertainment business, those options provided Lund with a “reasonable means of commercial adult activity as an alternative to [the zoning ordinances’] restrictions.” Accordingly, the court concluded that the ordinances did not violate the First Amendment.

See also: *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29, 12 Media L. Rep. (BNA) 1721 (1986).

See also: *D.H.L. Associates, Inc. v. O’Gorman*, 199 F.3d 50 (1st Cir. 1999).

Case Note:

In evaluating the percentage of available land in the City for adult entertainment businesses, the district court had “rested on explicit consideration of the City’s urban nature, and the City’s larger land mass.”

Signs—Resort’s sign on one lot gives directions to resort registration office on different lot

Town Selectboard contends sign violates ordinance prohibiting off-premises signs

Citation: *Town of Bartlett Bd. of Selectmen v. Town of Bartlett Zoning Bd. of Adjustment*, 2013 WL 1497323 (N.H. 2013)

NEW HAMPSHIRE (04/12/13)—This case addressed the issue of whether a resort’s sign on one lot giving directions to a registration office located on a different lot -with both lots geographically located at the resort’s place of business—was permitted under a town’s zoning ordinance prohibiting off-premise signs.

The Background/Facts: River Run Company, Inc. (“River Run”)

maintained vacation ownership units at Attitash Mountain Village, a resort in Bartlett, New Hampshire (the "Town"). In September 2009, River Run applied to the Town's Board of Selectmen (the "Selectboard") for a permit to place a sign on Route 302, advertising, "The Suites at Attitash Mountain Village." The Selectboard approved River Run's application. River Run then erected the sign at the westerly entrance to the resort area. At some point, an additional, smaller sign was affixed underneath the approved sign. The additional sign read: "REGISTRATION .3 MILES BACK ON LEFT." The sign referred to the registration office where patrons registered for Attitash Mountain Village. The office was located on a lot within Attitash Mountain Village, separate from the lot on which the sign was located.

Thereafter, the Selectboard informed River Run that the additional sign violated the Town's Zoning Ordinance (the "Ordinance"). The Selectboard contended that the sign violated: Article XVI, section A-10 of the ordinance, which prohibited the erection of an outdoor sign "on any premises other than on the premises where the activity to which the sign pertains is located"; and Article XVI, Section D, which prohibited off-premise signs "in all districts except as provided elsewhere in [the] Ordinance." The Selectboard reasoned that because the sign advertised the registration office which was not on the property where the sign was, the sign was considered an off premise sign and therefore not permitted.

River Run appealed to the Town's Zoning Board of Adjustment (the "ZBA"). The ZBA determined "that the sign served as a directional sign for patrons," and thus, pursuant to another section of the Ordinance, was exempt from the provisions of the Ordinance prohibiting off-premise signs.

The Selectboard moved for rehearing. The ZBA denied the Selectboard's rehearing request.

The Selectboard then appealed to superior court. On appeal, among other things, it argued that River Run's sign was not exempt as a directional sign.

The trial court ruled that the sign was not an off-premises sign. The court found that the term "premises" in the Ordinance could be interpreted to mean more than a single lot of land, and could mean multiple lots under the same ownership.

The Selectboard appealed. It argued that the term "premises" referred more accurately to a single lot of land. Again, it maintained that the sign advertised the registration office which was not on the same lot as the sign, and therefore the sign was considered an off premise sign and not permitted under the Ordinance.

DECISION: Affirmed.

The Supreme Court of New Hampshire held that the sign was not an off-premises sign and therefore was permitted under the Town's Ordinance.

In so concluding, the court looked to the ordinary and plain meaning of the language of the Ordinance. Finding the Ordinance did not define

“premises,” it then looked “to the common and approved usage of” the word. The court found that *Black’s Law Dictionary* defined “premises,” in relevant part, as “[a] house or building, along with its grounds.” It found that *Webster’s Third New International Dictionary* defined “premises,” in pertinent part, as “a specified piece or tract of land with the structures on it” or “the place of business of an enterprise or institution.”

Based on those definitions, the court concluded that the word “premises” in this case included the buildings and grounds associated with the place of business of Attitash Mountain Village—namely, vacation ownership units, including its registration office—regardless of whether the buildings and grounds were located on separate lots. Thus, here, although the sign and the registration office were on different lots, both were geographically located at the place of business of Attitash Mountain Village and, therefore, were on the same “premises.” Accordingly, the sign was not a prohibited off premises sign.

Addressing the Selectboard’s argument that “premises” more accurately referred to a single lot of land, the court reasoned that, had it been the intent of the drafters of the Ordinance to interpret the word “premises” as a single lot of land, they could have done so by using the word “lot.”

See also: *State v. Thiel*, 160 N.H. 462, 999 A.2d 367 (2010).

See also: *General Linen Services, Inc. v. Franconia Inv. Associates, L.P.*, 150 N.H. 595, 842 A.2d 105 (2004).

Case Note:

The Selectboard had voiced concern that interpreting the word “premises” to mean the buildings and grounds associated with the place of business would lead to a proliferation of business signs in the Town. The court disagreed. It found such interpretation merely allowed for the placement of outdoor signs on the premises of the business. The court did not read the word “premises” so broadly as to refer to multiple businesses located throughout Bartlett which happen to be operated by a single owner. Thus, while River Run also owned several other businesses at different properties, it could not place signs related to one business on the property of another business.

Zoning News from Around the Nation

CALIFORNIA

The California Supreme Court has determined that “local jurisdictions can ban marijuana operations.” The court held that the state’s Compassionate Use Act (CUA) and Medical Marijuana Program (MMP) did not

“override the zoning, licensing, and police powers of local jurisdictions,” or “mandate local accommodation of medical marijuana cooperatives, collectives, or dispensaries.” Meanwhile, the state Legislature is considering pending medical marijuana regulatory bills, including SB 439 and AB 473. (Look for a summary of this court decision in the next Bulletin.)

- Source: *Beverly Hills Patch*; <http://beverlyhills.patch.com>

ILLINOIS

In St. Clair County, property owners “now face hefty fines unless they remove graffiti etched or painted on buildings and fences within five to 14 days of notice from county inspectors.” Newly revised legislation recently approved by the County Board allows the county to fine property owners between \$75 to \$750 for each day the graffiti is not removed. Reportedly, the change in the ordinance is an effort to eliminate gang graffiti.

Source: *Belleville News Democrat*; www.bnd.com

MASSACHUSETTS

Massachusetts public health officials have approved regulations for the use of medical marijuana. The Commonwealth’s Department of Public Health “approved regulations to govern the 35 dispensaries to be licensed around the state and allow patients, with cancer, Parkinson’s or other debilitating conditions determined by a doctor, to receive medical marijuana. Under the rules, patients approved for medical marijuana can receive up to 10 ounces as a 60-day supply, though some acutely ill patients could receive more with permission from their doctor.” The new rules officially go into effect on May 24. Still, dispensaries may not be operable for some time. “While Attorney General Martha Coakley has ruled that towns cannot explicitly bar medical marijuana treatment centers from being established within their borders, they can impose zoning restrictions on the dispensaries, which may create obstacles for operators looking to establish a facility.” Also, many area towns have placed moratoriums on the operation of dispensaries.

Source: *Milford Daily News*; www.milforddailynews.com

NORTH CAROLINA

Under a bill that has passed the state House, the town of Weaverville would “lose the ability to enforce its zoning rules in an area up to a mile from town limits.” Reportedly, the bill would also end the practice of nontown residents serving on two Weaverville zoning boards.

Source: *Black Mountain News*; www.blackmountainnews.com

Zoning Bulletin

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Preemption—City Zoning Ordinances Ban Facilities That Distribute Medical Marijuana

Medical marijuana dispensary says ban is invalid as preempted by state statutes

Citation: *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.*, 2013 WL 1859214 (Cal. 2013)

CALIFORNIA (05/06/13)—This case addressed the issue of whether

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California's medical marijuana statutes preempt a local ban on facilities that distribute medical marijuana.

The Background/Facts: Since 2009, Inland Empire Patients Health and Wellness Center, Inc. ("Inland Empire") operated a medical marijuana distribution facility in the City of Riverside, California (the "City"). In January 2009, the planning division of the City's Community Development Department sent a written notice to the lessee of the property (the "Property") on which Inland Empire's facility was located, Lanny Swerdlow ("Swerdlow"). That notice explained that the City's zoning ordinances (the "RMC" or the "ordinances") banned medical marijuana dispensaries, medical marijuana collectives, and medical marijuana cooperatives. The RMC further provided that violation of the ordinances was a public nuisance which may be abated by the City.

In May 2010, the City filed a complaint in court against: Inland Empire; Swerdlow; the owners and lessors of the Property; the Property mortgagor; the Property management service provider; a medical clinic immediately adjacent to Inland Empire's medical marijuana distribution facility; and a board member and manager of Inland Empire (hereinafter, collectively, the "Dispensary"). The City asked the court for a preliminary injunction against operation of Inland Empire's facility. The trial court granted the preliminary injunction. It prohibited the Dispensary and all persons associated with them from using, or allowing use of, the Property to conduct "any activities or operations related to the distribution of marijuana."

The Dispensary appealed. Challenging the injunction, the Dispensary argued that the City's total ban on facilities that cultivate and distribute medical marijuana in compliance with California's Compassionate Use Act (the "CUA") (Health & Saf. Code, § 11362.5) and Medical Marijuana Program (the "MMP") (Health & Saf. Code §§ 11362.7 to 11362.9) was invalid. Among other things, the CUA and the MMP exempt the "collective[] or cooperative[] cultiva[tion]" of medical marijuana by qualified patients and their designated caregivers from prosecution or abatement under specified state criminal and nuisance laws that would otherwise prohibit those activities. The Dispensary maintained that the City's ordinances banning medical marijuana dispensaries were in conflict with, and were thus preempted by, the CUA and MMP.

The Court of Appeals disagreed with the Dispensary. It found that the City's zoning ordinances banning medical marijuana dispensaries did not duplicate or contradict the state statutes concerning medical marijuana, and that they did not invade a field expressly or impliedly occupied by those laws. The Court of Appeals affirmed the trial court's grant of the preliminary injunction.

The Dispensary again appealed.

DECISION: Affirmed.

The Supreme Court of California held that the CUA and MMP did not expressly or impliedly preempt the City's zoning provisions declaring a medical marijuana dispensary to be a prohibited use and a public nuisance anywhere in the City limits.

The court explained that the City zoning ordinances would only be preempted by the CUA and MMP, and thus void, if the zoning ordinances conflicted with the CUA and MMP by: (a) being duplicative (i.e., coextensive therewith); (b) being contradictory (i.e., inimical thereto); or (c) entering an area that was "fully occupied" by the CUA and MMP.

The court found none of those bases for preemption existed here. Rather, the court found that the CUA and the MMP were "limited in scope": "They merely declare that the conduct they describe cannot lead to arrest or conviction, or be abated as a nuisance, as violations of enumerated provisions of the Health and Safety Code. Nothing in the CUA or the MMP expressly or impliedly limits the inherent authority of a local jurisdiction, by its own ordinances, to regulate the use of its land, including the authority to provide that facilities for the distribution of medical marijuana will not be permitted to operate within its borders," found the court.

More specifically, the court found that neither the CUA nor the MMP expressly preempted local zoning laws. The court noted that the CUA "makes no mention of medical marijuana cooperatives, collectives, or dispensaries." It merely provides that state laws against the possession and cultivation of marijuana shall not apply to certain persons; it creates no "broad right to use [medical] marijuana without hindrance or inconvenience." The court found that while the MMP does address collectives and cooperatives, it similarly: is narrow—specifying only that qualified persons are exempt from prosecution and conviction under enumerated state antimarijuana laws; and creates no "broad right" of access to medical marijuana "without hindrance or inconvenience." "No provision of the MMP explicitly guarantees the availability of locations where such activities may occur, restricts the broad authority traditionally possessed by local jurisdictions to regulate zoning and land use planning within their borders, or requires local zoning and licensing laws to accommodate the cooperative or collective cultivation and distribution of medical marijuana," found the court.

Under those same considerations, the court also found that neither the CUA nor the MMP impliedly preempted the City's zoning ordinances banning medical marijuana dispensaries: "Neither the CUA nor the MMP requires the cooperative or collective cultivation and distribution of medical marijuana that [the City's] ordinance deems a

prohibited use of property within the city's boundaries. Conversely, [the City's] ordinance requires no conduct that is forbidden by the state statutes. Persons who refrain from operating medical marijuana facilities in [the City] are in compliance with both the local and state enactments."

Finally, the court found no attempt by the Legislature to fully occupy the field of medical marijuana regulation as a matter of statewide concern. On the contrary, the court found that the CUA and MMP took only modest steps to exempt particular medical marijuana activities from state laws that would otherwise prohibit them; they offered "no comprehensive scheme or system for authorizing, controlling, or regulating the processing and distribution of marijuana for medical purposes, such that no room remains for local action."

The court affirmed the grant of the preliminary injunction, prohibiting the Dispensary and all persons associated with them, from using, or allowing use of, the Property to conduct "any activities or operations related to the distribution of marijuana."

See also: *City of Claremont v. Kruse*, 177 Cal. App. 4th 1153, 100 Cal. Rptr. 3d 1 (2d Dist. 2009).

See also: *Ross v. RagingWire Telecommunications, Inc.*, 42 Cal. 4th 920, 70 Cal. Rptr. 3d 382, 174 P.3d 200, 20 A.D. Cas. (BNA) 223, 155 Lab. Cas. (CCH) P 60553, 57 A.L.R.6th 727 (2008).

See also: *People v. Mentch*, 45 Cal. 4th 274, 85 Cal. Rptr. 3d 480, 195 P.3d 1061, 50 A.L.R.6th 673 (2008), as modified, (Dec. 17, 2008).

See also: *County of Los Angeles v. Hill*, 192 Cal. App. 4th 861, 121 Cal. Rptr. 3d 722 (2d Dist. 2011), review denied, (May 11, 2011).

Case Note:

In its discussion, the court made clear that the CUA and MMP did not "authorize" [medical marijuana dispensaries], to the exclusion of local bans, simply by exempting those activities from otherwise applicable state prohibitions. The Dispensary had urged that by exempting the collective or cooperative cultivation of medical marijuana by qualified patients and their designated caregivers from treatment as a nuisance under the state's drug abatement laws, the MMP barred local jurisdictions from adopting and enforcing ordinances that treated those very same activities as nuisances subject to abatement. The court, however, disagreed. It noted that "[n]uisance law is not defined exclusively by what the state makes subject to, or exempt from, its own nuisance statutes. Unless exercised in clear conflict with general law, a city's or county's inherent, constitutionally recognized power to determine the appropriate use of land within its borders allows it to define nuisances for local purposes, and to seek abatement of such nuisances." Here,

while the MMP signaled that the state would not regard medical marijuana collectives or cooperatives as nuisances or criminal violations, “the MMP’s limited provisions neither expressly or impliedly restrict or preempt the authority of individual local jurisdictions to choose otherwise for local reasons, and to prohibit collective or cooperative medical marijuana activities within their own borders. A local jurisdiction may do so by declaring such conduct on local land to be a nuisance, and by providing means for its abatement.”

Nonconforming Uses—Bar Owner Says Operation of Floating Bar on State-owned Lake is Outside of City’s Zoning Authority

City says use of property as ingress, egress, parking, and related bathroom use for patrons of bar is outside the nonconforming marina use

Citation: *City of Okoboji v. Parks*, 2013 WL 1785992 (Iowa 2013)

IOWA (04/26/13)—This case addressed the issue of whether a city can enjoin from operation uses on property within its geographic boundaries that support activities outside its geographic boundaries, as inconsistent with a preexisting nonconforming use.

The Background/Facts: Historically, two marinas were located on the lakeshore of West Lake Okoboji. In 1972, the City of Okoboji (the “City”) enacted a zoning ordinance, which zoned the properties where the marinas were located as “lakeshore residential.” In that zone, the only permitted principal use permitted was single-family dwellings. The City zoning ordinance further prohibited the use of property in a lakeshore residential zone as an entry point for commercial access.

In 1973, the two marinas received special-use permits that grandfathered in their then-existing operations as nonconforming uses under the ordinance. In 1975, the two marinas merged into a single marina known as Okoboji Boat Works.

In 2001, Leo Parks, Jr. (“Parks”) purchased Okoboji Boat Works. Parks sought to build a bar on the marina property that would serve on-

site liquor. The City denied Parks' request for a commercial liquor license. The City said such a use represented an unpermitted, substantial change in the nature and character of the use permitted under the special use permit.

Eventually, the City obtained in court a permanent injunction against use of the property as a bar. The court agreed with the city that such an activity illegally changed the nature and character of the nonconforming use. As a result, the court held that a bar could not be an accessory use to the operation of the marina.

Undeterred, Parks sought to operate a bar on an excursion boat—a 30-by-40-foot structure on pontoons—on the lake bed. The lake bed was under the State of Iowa's jurisdiction. Parks obtained a liquor license from the State and began operating the "Fish House Lounge" on the excursion boat.

The City again brought an action in court, asking the court to prohibit operation of the Fish House Lounge.

Parks argued that the City had no zoning authority over the land beneath the mean high water mark of the lake and the lake bed because it was within the State's jurisdiction.

The City argued it only sought to regulate the use of the real property on the upland estate that supported activities occurring on the Fish House Lounge, including: ingress, egress, parking, and restroom facilities. The City maintained that those uses were outside the nonconforming use of marina operations and could not be considered permitted accessory uses.

The district court entered an injunction prohibiting Parks from: (1) "using the upland property to provide access to or from, provide parking for persons seeking access to or from, or provide supporting services including bathroom facilities to patrons of . . . [the Fish House Lounge], while [it was] moored . . . [to the dock on the premises]"; and (2) from "[operating a bar] [on any boat] . . . moored or attached to the premises or . . . to a dock extending from said premises."

Parks appealed.

DECISION: Affirmed as modified.

The Supreme Court of Iowa held that the City had shown a use of the property that exceeded the scope of the prior nonconforming use allowed under the special-use permits.

The court found that, although Parks had moved the bar over the lake bed—and out of the City's jurisdiction—the fact remained that Parks proposed to use real property within the City limits to support an expansion of activities associated with the marina—a floating bar—by providing ingress, egress, parking, and restroom facilities. The court held that the use of the upland for access or as an accessory use in

contravention of zoning regulations to support activities on lands lying underwater amounted to a zoning violation.

The court concluded that: “[t]he use of the property for ingress and egress, for restroom facilities, and for parking to a floating bar moored at the marina” were not accessory uses to the valid, nonconforming use of the marina. The court also found that those uses of the upland real estate were also in violation of portions of the City’s zoning ordinance, which prohibited such lakeshore lots from being used for access to commercial activities. Also, the court concluded that the City had met its burden of showing the need for injunctive relief.

See also: *City of Okoboji, Iowa v. Okoboji Barz, Inc.*, 717 N.W.2d 310 (Iowa 2006).

Case Note:

The court disagreed with the district court in one respect. The court concluded that the injunction should not enjoin the provision of or sale of liquor on boats when moored at the docks as compared to those moored directly to the shoreline. This distinction, however, made little difference, as the City showed entitlement to an injunction that prohibited Parks from using the upland to provide ingress, egress, parking, or restroom facilities to patrons of boats selling alcohol or engaging in bar-type activities while docked at the marina.

Preemption/Constitutional Validity— County Ordinance Limits Location, Number of Plants of Medical Marijuana Collectives

Medical marijuana collective challenges ordinance as invalid in conflict with state law and unconstitutional in violation of equal protection

Citation: *County of Tulare v. Nunes*, 215 Cal. App. 4th 1188, 155 Cal. Rptr. 3d 781 (5th Dist. 2013)

CALIFORNIA (04/29/13)—Among other things, this case addressed the issue of whether a municipal ordinance restricting the total number of medical marijuana plants in any medical marijuana collective

“MMC”) conflicts with California’s Compassionate Use Act (“CUA”) or Medical Marijuana Program Act (“MMP”). It also addressed the issue of whether an ordinance restricting MMC’s to commercial and manufacturing zones violates the equal protection clause of the California Constitution.

The Background/Facts: The County of Tulare (the “County”) restricted the location of medical marijuana collectives and cooperatives (“MMC’s”) to commercial and manufacturing zones, pursuant to § 15.3 of the County zoning ordinance (the “Ordinance”). Jeffrey Nunes, Jr. and Foothill Growers Association, Inc. (collectively, the “Collective”) operated an MMC in an agricultural zone in the County. The County brought an action for injunctive relief. It sought to require the Collective to discontinue the nonconforming use of the property. It argued that the Collective’s use of the property violated the Ordinance and also, based on that violation, was a public nuisance.

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the trial court issued summary judgment in favor of the County. The court issued an injunction prohibiting the Collective from operating an MMC at that location in violation of the zoning ordinance.

The Collective appealed. They argued that the Ordinance was invalid and unenforceable because: (1) it conflicted with the CUA and the MMP; and (2) it was unconstitutional in violation of the equal protection clause of the California Constitution.

Among other things, the CUA (Health & Saf. Code, § 11362.5) and the MMP (Health & Saf. Code, §§ 11362.7 to 11362.9) exempt the collective or cooperative cultivation of medical marijuana by qualified patients and their designated caregivers from prosecution or abatement under specified state criminal and nuisance laws that would otherwise prohibit those activities.

The equal protection clause of the California Constitution provides that “persons similarly situated with respect to the legitimate purpose of the law receive like treatment.” (See Cal. Const., art. I, § 7.)

The Collective argued, among other things, that the Ordinance’s restriction of the total number of marijuana plants in any MMC to 99 was contrary to, and therefore preempted by, the CUA and MMP. Also, the Collective argued that the Ordinance violated the equal protection clause of the California Constitution because it treated MMC’s unequally from individuals who grow medical marijuana—singling out MMC’s for special zoning restrictions (as to location).

DECISION: Affirmed.

The Court of Appeal, Fifth District, California, held that the Ordinance’s restriction of the total number of marijuana plants in any

MMC to 99 did not conflict with the CUA or the MMP. The court found that since the CUA is narrow in scope, merely provides a defense to certain crimes, and does not provide for collectives or cooperatives, the Ordinance's quantity limitation applicable to MMC's did not conflict with the CUA. The court also found that the Ordinance's quantity limitation did not conflict with a provision of the MMP (§ 11362.77) that outlined amounts of medical marijuana that qualified patients and caregivers could possess. The MMP provision was not a guarantee but merely an outer limit on possession amounts without prosecution, said the court.

The Court of Appeal also held that the Ordinance did not violate the equal protection clause of the California Constitution. The court acknowledged that the Ordinance did single out MMC's for special zoning restrictions (as to location). However, the court also found that it did not appear that MMC's were similarly situated to individuals for purposes of the Ordinance. Moreover, the court found the different treatment of MMC's bore a rational relationship to legitimate government interests: Since an MMC would involve a number of individuals associating, cooperating, or operating together, there would be an increased likelihood of a higher concentration of plants in cultivation and/or a greater quantity of medical marijuana present in one place. As such, found the court, it would be "reasonable for the County to assume that MMC's would tend to increase the risk factors of such a land use above that of individual cultivation."

See also: *People v. Kelly*, 47 Cal. 4th 1008, 103 Cal. Rptr. 3d 733, 222 P.3d 186 (2010).

Case Note:

The Collective had also argued that the Ordinance conflicted with the MMP because the Ordinance defined MMC's and the MMP did not. The court found no conflict, and determined that the Ordinance merely gave the "collective" and "cooperative" concepts reasonable specification and parameters.

Case Note:

The Collective had also argued that, since one of the objectives of the MMP was greater uniformity in applying the CUA in each county, the Legislature could not have intended that medical marijuana collectives, cooperatives, or dispensaries would be regulated or restricted by local zoning laws such as the County's Ordinance. The court here disagreed. It noted that the Legislature has rejected that proposition in the recent amendments to the MMP, which clarified that a city or other local governing body may "[a]dopt[] local ordinances that regulate the location, operation, or establishment of a medical

marijuana cooperative or collective." (§ 11362.83, subd. (a); see also, § 11362.768, subds. (f), (g).) It also agreed with "the analyses and conclusions of other Courts of Appeal that have held that local governing bodies may, under their traditional police powers, regulate medical marijuana land uses by means of local zoning ordinances and other regulations." (See also *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.*, 2013 WL 1859214 (Cal. 2013), highlighted in this Bulletin.)

Zoning News from Around the Nation

MASSACHUSETTS

Lawmakers have recently introduced a bill "that for the first time in 37 years would update the state law that governs municipal zoning, subdivision control, and planning." Proponents of the proposed update to the Massachusetts enabling law (established in 1975) say that a "contemporary law to deal with modern circumstances" is needed. Among other things, the bill—"An Act Promoting the Planning and Development of Sustainable Communities"—would reportedly:

- abolish a law that allows subdivisions to be built with no planning board review or approval if the proposed homes front an existing road;
- allow a community to require only a simple majority vote to change a zoning law;
- authorize "inclusionary zoning," providing more affordable homes in exchange for more homes to be built on a lot than permitted under zoning;
- allow a majority vote on a zoning or planning board in order to issue a special permit;
- approve impact fees for a community to recoup some of the capital costs for private developments;
- create an alternative process to resolve disputes among applicants, municipal officials and the public with a "neutral facilitator";
- overhaul the current law on issuing variances from zoning ordinances or bylaws;
- create the option of consolidated permitting for projects;
- update the elements of a master plan to include five requirements: goals and objectives, housing, natural resources and energy, land use and zoning, and putting the plan into effect;

- allow local regulations to require dedicating up to 5% of subdivision land for park or playground use by residents; and
- provide additional tools and incentives to communities that vote to “opt-in” on a state strategy called “planning ahead for growth.”

Source: *The Republican*; <http://www.masslive.com>

NEW YORK

The Lansing Town Board unanimously passed an extension to the Town’s moratorium on high impact commercial and industrial activities. The moratorium is intended “to protect the town against the threat of hydrofracking while the town updates ordinances and plans to offer permanent protection against potential environmental and road damage to town property.” The new law extends the moratorium for another year.

Source: *The Lansing Star*; www.lansingstar.com

NORTH CAROLINA

Bills (Senate Bill 287 and House Bill 504) pending before the State General Assembly “would enable certain towns and counties, as well as the state Department of Environment and Natural Resources, to only have to advertise their public meetings on their websites, dropping the requirement that they publish meeting notices in newspapers.”

Source: *Carteret County News-Times*; <http://www.carolinacoastonline.com>

ZONING PRACTICE

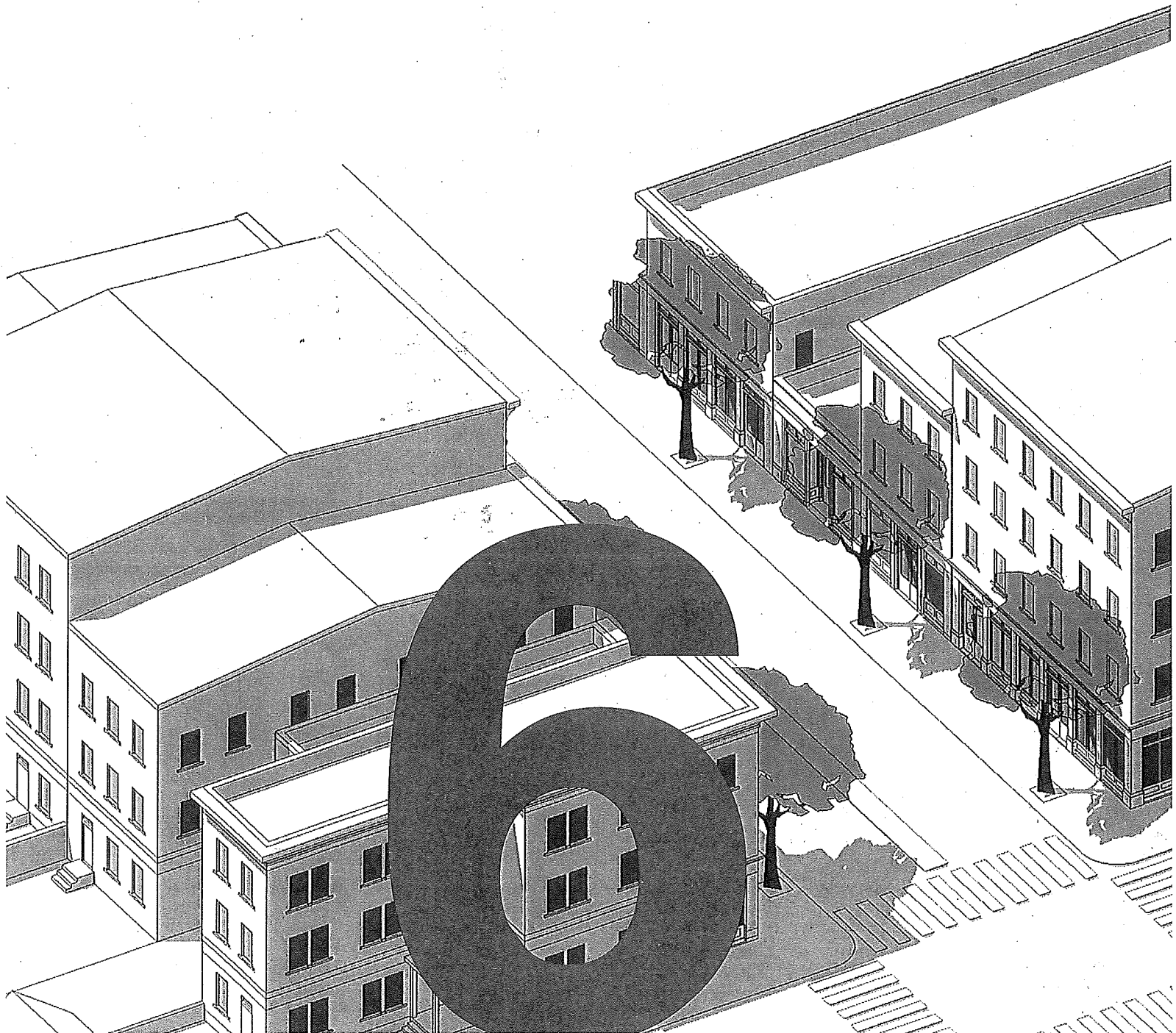
JUNE 2013



AMERICAN PLANNING ASSOCIATION

➔ ISSUE NUMBER 6

PRACTICE FORM-BASED ZONING



Avoiding Common Form-Based Code Mistakes, Part 2

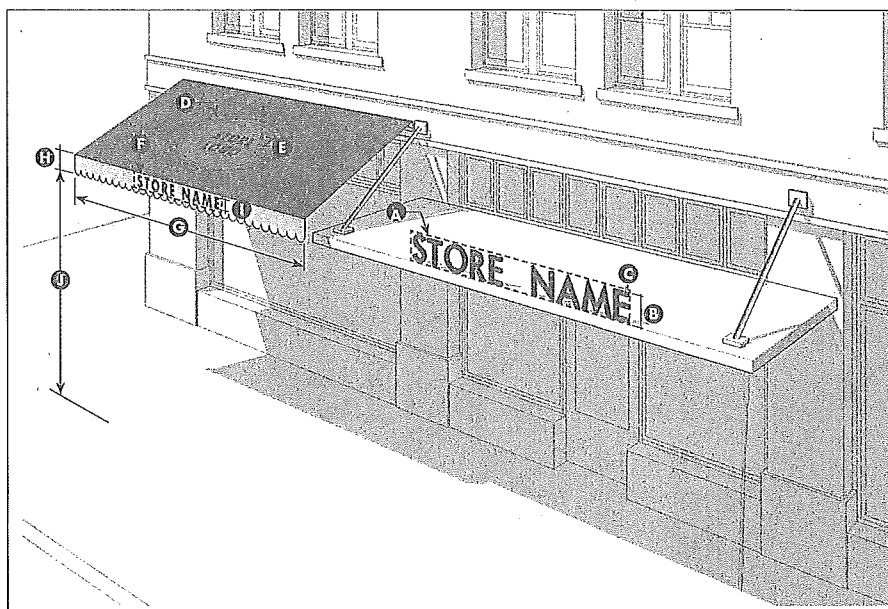
By Daniel Parolek

This article is the second part of a two-part series intended to arm city planners and code writers with the knowledge to effectively lead, coordinate, or contract out for a form-based coding project.

Part one focused on misconceptions and common mistakes related to the practice of form-based coding. It also reinforced that form-based coding represents a paradigm shift in zoning and should not be thought of as simply a way to refine a Euclidean zoning ordinance. The table included in part one presented a range of different approaches to regulating urban form and introduced terminology to differentiate these approaches. Some of the themes from part one spill over to this issue, such as the discussion about the role of land-use tables within form-based codes (FBCs), the importance of the community character analysis and visioning phases, and the effective use of the urban to rural transect. This issue continues the list of common mistakes to avoid and concludes with a list of tips for creating an effective FBC.

NOT CAREFULLY VETTING ALL DEVELOPMENT STANDARDS

Most standards within Euclidean zoning codes are based on a suburban paradigm of separating and buffering uses. Consequently, these codes include many barriers to creating walkable urban environments and often include provisions that are not relevant, or at least less important, in a walkable urban environment. Therefore it is crucial to evaluate all use-specific and general development standards, including parking, landscaping, lighting, signage, and stormwater standards, from the perspective of whether or not they are applicable to creating or reinforcing walkable urban places. Specific examples of this include landscape buffers, extensive parking lot landscaping standards, lengthy and complicated signage standards, and the convoluted way in which many codes try to define mixed use or live/work.



| A. Description | | Size (continued) | |
|---|--|---|---|
| Awning Signs. Awnings are a traditional storefront fitting and can be used to protect merchants' wares and keep storefront interiors shaded and cool in hot weather. Retail tenant signs may be painted, screen printed, or appliquéed on the awnings. | | Valance | |
| B. Standards | | Sign Area | 75% coverage max. (E) |
| Size | | Width | Storefront width, max. (G) |
| Projecting | 1 sq. ft. per linear foot of shopfront, max. (A) | Height | 8" min.; 16" max. (H) |
| Sign Area | 16" max. (B) | Lettering Height | 8" max. (I) |
| Lettering Height | 6" max. (C) | Location | |
| Lettering Thickness | | Clear Height | 8' min. (J) |
| Sloping Plane | | Signs per Awning | 1 projecting; or 1 valance and 1 sloping plane max. |
| Sign Area | 25% coverage max. (D) | Miscellaneous | |
| Lettering Height | 18" max. (E) | Only the tenant's store name, logo, and/or address should be applied to the awning. Additional information is prohibited. | |
| | | Open-ended awnings are strongly encouraged. | |
| | | Vinyl or plastic awnings are strongly discouraged. | |

➔ Effective form-based codes address and refine all general development standards such as this signage extract from a typical FBC.

ASK THE AUTHOR JOIN US ONLINE!

Go online during the month of June 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.

NOT REFINING THE USE TABLES

One of the most positive influences FBCs have had on many recent zoning reform efforts, form-based or not, is simplifying and clarifying the approach to use tables. The following are recommendations for use tables within an FBC:

1. Do not pull your existing use tables into your FBC without carefully refining them.
2. Organize your table by clearly defined but generalized use types. This allows the list to be shorter and for staff to determine what general use type category a use fits into.
3. Make sure that you have an administrative use permit level of approval that allows staff to determine if potentially supportive uses are appropriate for a zone.
4. Be sure to consider the size of use as well as the use itself in terms of appropriateness and impact.

For example, along a neighborhood main street, general commercial should be permitted by right up to a certain size, usually around 10,000 square feet. Larger retail uses typically serve a regional market and have greater impacts due to their traffic generation. Therefore, you could permit up to 10,000 square feet by right, allow between 10,001 and 15,000 square feet


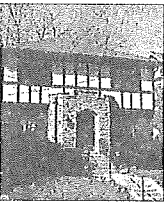

- ➔ Building type standards, when included, are supplemental to building form standards. Typically a range of building types are allowed for each form-based zone, and the building type standards define and regulate characteristics of each permissible building type.

with an administrative use permit, and require a conditional use permit for anything larger.

OVERCOMPLICATING TRANSECT CALIBRATION

As mentioned in part one, not all FBCs are transect based; it is simply one of many different possible organizing principles. But the transect has proven to be an effective tool for site-specific and citywide applications in cities like Miami, Cincinnati, Flagstaff, Arizona, and even small towns like Kingsburg, California. Other cities, like Fresno and Tehachapi, California, used the transect as a foundation but changed the terminology at the request of

the community. When calibrating the transect to make it specific to your community, you should always use the six base transect zones as a starting point and tier subzones off of those bases. If you create more than six base transect zones, you may overcomplicate the coding process. It is likely, especially if you are applying the code city- or countywide, that you will need to create subzones underneath the six base zones. For example, Miami's FBC has seven T-6 Urban Core zones, and Beaufort County, South Carolina, on the more rural side, has an early draft with two T2 zones and three T3 zones.

| Building Type | Transect Zones | | | | | | | | | | |
|---|---|-----|-----|-------|-------|------|-------|-------|-----|-----|--|
|  <p>Rowhouse. This Building Type is a small- to medium-sized typically attached structure that consists of 2–8 Rowhouses placed side-by-side. In a feature unique to Cincinnati, this Type may also occasionally be detached with minimal separations between the buildings. This Type is typically located within medium-density neighborhoods or in a location that transitions from a primarily single-family neighborhood into a neighborhood main street. This Type enables appropriately-scaled, well-designed higher densities and is important for providing a broad choice of housing types and promoting walkability. Syn: Townhouse</p> | <table border="1"> <tr><td>T3E</td><td>T3N</td></tr> <tr><td>T4N.1</td><td>T4N.2</td></tr> <tr><td>T5MS</td><td>T5N.1</td></tr> <tr><td>T5N.2</td><td>T5F</td></tr> <tr><td>T6C</td><td></td></tr> </table> | T3E | T3N | T4N.1 | T4N.2 | T5MS | T5N.1 | T5N.2 | T5F | T6C | |
| T3E | T3N | | | | | | | | | | |
| T4N.1 | T4N.2 | | | | | | | | | | |
| T5MS | T5N.1 | | | | | | | | | | |
| T5N.2 | T5F | | | | | | | | | | |
| T6C | | | | | | | | | | | |
|  <p>Multi-plex: Small. This Building Type is a medium structure that consists of 3–6 side-by-side and/or stacked dwelling units, typically with one shared entry or individual entries along the front. This Type has the appearance of a medium-sized family home and is appropriately scaled to fit sparingly within primarily single-family neighborhoods or into medium-density neighborhoods. This Type enables appropriately-scaled, well-designed higher densities and is important for providing a broad choice of housing types and promoting walkability.</p> | <table border="1"> <tr><td>T3E</td><td>T3N</td></tr> <tr><td>T4N.1</td><td>T4N.2</td></tr> <tr><td>T5MS</td><td>T5N.1</td></tr> <tr><td>T5N.2</td><td>T5F</td></tr> <tr><td>T6C</td><td></td></tr> </table> | T3E | T3N | T4N.1 | T4N.2 | T5MS | T5N.1 | T5N.2 | T5F | T6C | |
| T3E | T3N | | | | | | | | | | |
| T4N.1 | T4N.2 | | | | | | | | | | |
| T5MS | T5N.1 | | | | | | | | | | |
| T5N.2 | T5F | | | | | | | | | | |
| T6C | | | | | | | | | | | |
|  <p>Multi-plex: Large. This Building Type is a medium- to large-sized structure that consists of 7–18 side-by-side and/or stacked dwelling units, typically with one shared entry. This Type is appropriately scaled to fit in within medium-density neighborhoods or sparingly within large lot predominantly single-family neighborhoods. This Type enables appropriately-scaled, well-designed higher densities and is important for providing a broad choice of housing types and promoting walkability.</p> | <table border="1"> <tr><td>T3E</td><td>T3N</td></tr> <tr><td>T4N.1</td><td>T4N.2</td></tr> <tr><td>T5MS</td><td>T5N.1</td></tr> <tr><td>T5N.2</td><td>T5F</td></tr> <tr><td>T6C</td><td></td></tr> </table> | T3E | T3N | T4N.1 | T4N.2 | T5MS | T5N.1 | T5N.2 | T5F | T6C | |
| T3E | T3N | | | | | | | | | | |
| T4N.1 | T4N.2 | | | | | | | | | | |
| T5MS | T5N.1 | | | | | | | | | | |
| T5N.2 | T5F | | | | | | | | | | |
| T6C | | | | | | | | | | | |

Opticos Design, Inc.

CONFUSING BUILDING TYPES WITH FORM-BASED ZONE STANDARDS

The most effective FBCs replace use-based zones with form-based zones. The development standards for the form-based zones, often called building form standards, include prescriptive requirements for building location, height, size and massing, and parking location. In addition to defining a maximum development envelope on a lot, building form standards regulate how the buildings relate to one another to create a certain type of place.

In contrast, building types standards, if used in an FBC, are typically supplemental to the zone standards and define a set of allowed building types for each zone (typically more than one building type per zone). Each building type will then typically have type-specific design standards such as minimum size of a courtyard for a courtyard building type. Building types are a great way to articulate the ways that new development can complement an existing pattern to be reinforced or protected. While conventional zoning standards such as density and floor-area ratio (FAR) fail to acknowledge the patterns that make up the physical character of a community, the FBC applies components such as building types to recognize and address this character.

NOT SAYING NO TO PROJECTS THAT DO NOT MEET THE CODE

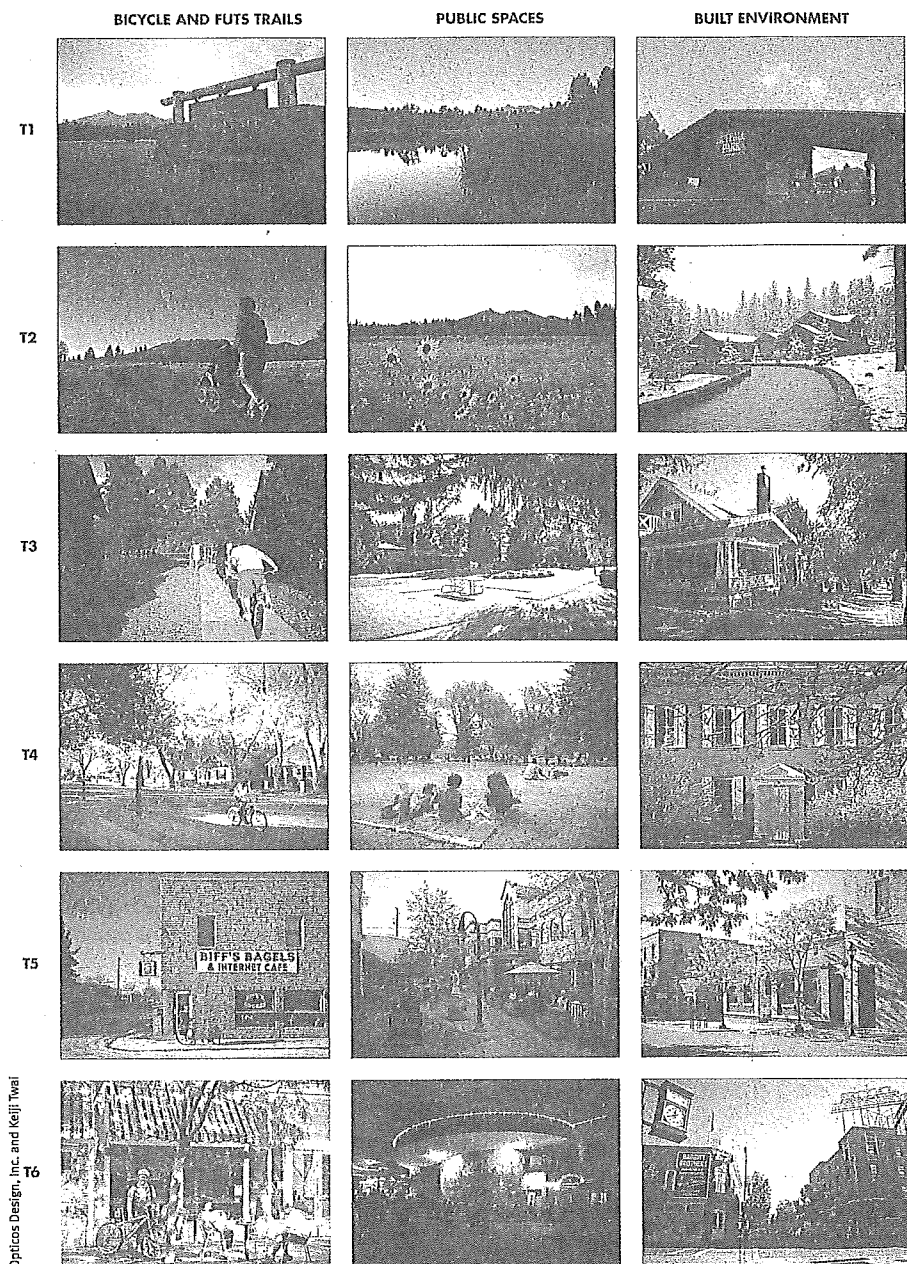
Your FBC can only work if your decision makers support it and use it as intended. Political pressure to compromise may come from a national drugstore or fast-food chain that petitions for an exception to the FBC's standards. Local officials must be willing to say no to projects that do not meet the community's vision and the code's intent. An important aspect of getting to this point is carefully integrating decision makers throughout the visioning process to enable them to have their say, to educate them on the intent, and to ultimately understand the long-term benefits of saying no.

TIPS FOR CREATING AN EFFECTIVE FBC

The final portion of this article focuses on tips for creating an effective FBC and includes guidance to help communities select a knowledgeable consultant.

Conduct a Community-Character Analysis

The most important step in creating an effective FBC is the community-character analysis, which establishes an understanding of a community's



Opticos Design, Inc. and Keiji Twai

➔ Extensive photo documentation of Flagstaff's unique community character informed the FBC effort.

unique DNA and makes it the foundation for the new zoning code. This analysis provides the missing link in zoning back to the unique aspects of a community. This step is also likely the most important differentiator between a conventional approach to zoning and a form-based coding approach. Instead of using the existing regulations as the foundation for the new regulations, the community character analysis enables the FBC to use the local character as the foundation and then compares it to the preexisting regulations to ensure that the code is not downzoning, ignoring

policy direction previously made by the city, or potentially causing other legal issues.

The community character analysis typically includes both macro-scale (citywide) and micro-scale (block, lot, and building) work, involving extensive mapping, photographing, and often measuring specific characteristics of a range of prototypical places within a community. The mapping will typically include transportation networks, building footprints, natural features, public spaces, neighborhood boundaries (ideally based on a quarter-mile walk

radius), existing zoning, and special features, such as topography. The photography helps illustrate specific building, frontage, and public space types as well as other opportunities and issues that will inform the visioning and coding process. Photographs also serve as the basis for poster boards showing the general community character for different types of places within a community. For these reasons, photographs are invaluable to the public-engagement process. For a more detailed explanation, see *Form-Based Codes* (Wiley 2008).

For a site-specific or neighborhood application, the community character analysis will show how the FBC application area relates to its larger context and build an understanding of the kit of parts for the FBC. In a citywide or countywide application this process is invaluable for developing an understanding of the different types of places that exist and developing a hierarchy of place types that should be integrated into comprehensive planning and reinforced by the FBC. An example of this is the rural crossroads place type that was defined for rural Beaufort County, South Carolina, as part of the community character analysis for its FBC.

For all scales of application, this process establishes a foundation for a vision and an FBC that is rooted in the history and culture of place. It is an excellent education tool and enables the coding team to build a level of trust with the community that the FBC will reinforce the unique and desirable aspects of the place.

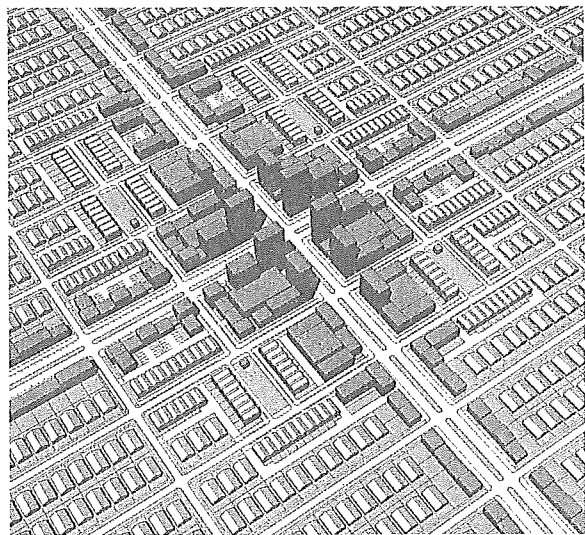
Complete a Visioning Process

FBCs are often described as a zoning tool that can predictably implement a community's vision. But to be effective as a foundation for an FBC, this vision needs to be more than just inspirational photos from other communities, generalized urban design diagrams, or broad policy statements advocating a mix of uses and walkability. A detailed visioning and public engagement process is invaluable to the long-term success of an FBC.

For citywide and other larger codes, there are two different approaches to visioning. The first approach focuses on prototypical design issues and how the code will address them. This does not necessitate a charrette but does include extensive public engagement. Miami's form-based coding team used this approach to visioning in creating Miami 21, a citywide FBC. The second strategy for large-scale visioning involves selecting prototypical priority sites or neighborhoods throughout the city or county,

hosting design charrettes for these sites, and using the resulting case studies to inform how the FBC will be effectively applied to similar types of places throughout the city or county. This approach was used in Livermore and Kingsburg, California; Flagstaff, Arizona; Cincinnati; and Beaufort County, South Carolina.

It is important to clarify that the charrette, as used here, is a multiday process—which is usually a minimum of four days of consistent engagement or four or more days broken into two, two-plus day sessions—involving a multidisciplinary team including an economist, transportation consultant, and other specialists needed to address place-specific issues such as affordable housing or main-street retail programming.



➔ For Miami's FBC, the code team used the visioning process to address appropriate transitions from high-intensity corridors into single-family neighborhoods and used this to inform the code standards and mapping along the corridors.

This information helps the code writers to anticipate and respond to the needs of the emerging plan, and it serves to help participants better understand the implications and features of the expected results. For more information on charrettes see *The Charrette Handbook* (APA Planners Press 2006).

While an FBC is not written during the charrette, it is important to make progress on the code during the charrette. Often, a charrette provides an opportunity to vet the intent of the code, finalize a list of form-based zones, and consider potential allowed uses. Furthermore, a charrette can be useful for fleshing out key dimensional regulations for zones; refining a list of frontage, building, and civic space types along with their descriptions and dimensional regulations; giving an overview of the typical code format; formulating one or more drafts of regulating plans that map form-based zones; outlining a strategy for plugging the FBC into a community's regulatory framework; and

discussing components of the FBC with city staff and other community stakeholders.

Graphically Assess Your Existing Code

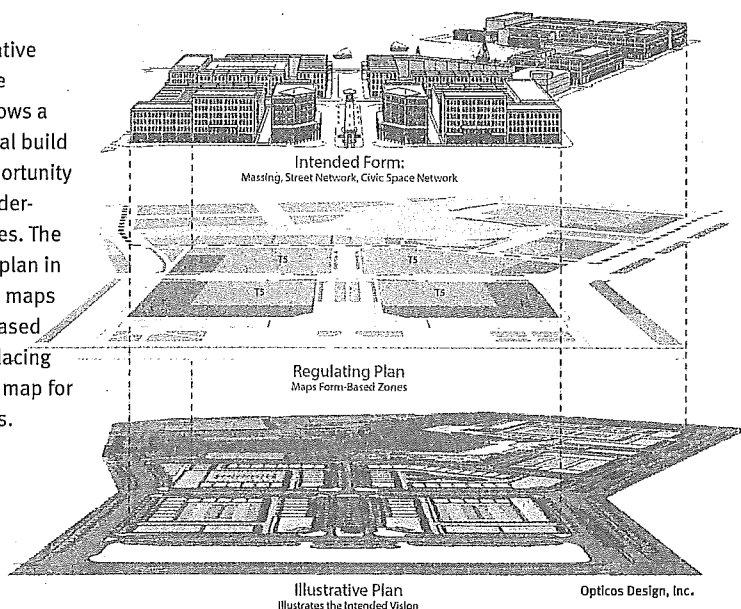
Unpredictable build out under Euclidean zoning codes is one of the primary reasons many communities are looking for alternative zoning approaches like FBCs. The numerical parameters of Euclidean codes, while easy to compare, do not create predictable built results and often preclude walkable, urban development.

To target these issue areas in your existing code your FBC process should use three-dimensional studies to graphically assess each existing zoning district (starting with medium-density residential, then moving on to commercial

districts in neighborhood main street and downtown areas) for two or three typical lot sizes that exist in those zones. This is most important in existing walkable urban areas. The studies should enable you to assess the following:

1. What regulation or set of regulations is the most limiting factor in development? This is typically parking but can also be lot coverage, FAR, setbacks, etc.
2. What regulations are promoting bad development? These may be provisions encouraging lot aggregation and large buildings in a context where smaller buildings are more appropriate, or they may be simple things like allowing parking in the front of houses or not requiring a large enough rear setback for medium-density residential areas.
3. Is your code disincentivizing smaller units? This is typically due to high parking requirements for small units.

➔ The illustrative plan on the bottom shows a hypothetical build out on opportunity sites or under-utilized sites. The regulating plan in the middle maps the form-based zones, replacing the zoning map for these areas.



and a more conventional approach to zoning can be used to regulate drivable suburban areas. Secondly, the community must determine the desired degree of change for each of these areas. This will ultimately help inform the vision process and the goal of the FBC. Ideally, a comprehensive plan also introduces a palette of walkable urban place types and the terminology of community character such as building types, frontage types, and transect zones (if you are going to use that as an organizing principle for your FBC). If a land-use map is required, it is helpful to also include a community character map or set of maps that lay out the desired place-type structure within the community as a supplement to the land-use map.

Rewrite Your Administration and Procedures Provisions

From an administrative perspective, the number one goal for any FBC is a clear path to entitlement for projects that meet the standards. Therefore an FBC process should start by diagramming the existing path—from submittal to approval—for the different types of projects or applications and then work to simplify this path for each type of project within the FBC application area. The public process defined above should enable and allow more administrative review and eliminate the need to publicly scruti-

4. What suburban DNA is inherent in the development standards? For example, when multifamily or commercial buildings get bigger, do the existing standards require a larger setback to “buffer” them from one another (suburban), or do the regulations encourage the buildings to get closer together and to the street (urban)?

Adopt a Comprehensive Plan That Sets the Stage for an FBC

The most important thing to do when writing a comprehensive plan in the context of preparing for an FBC is to designate, differentiate, and map (existing and desired) walkable urban and drivable suburban areas. The form-based coding will be used to regulate the walkable urban areas,

R-3 MULTI-FAMILY MEDIUM DENSITY RESIDENTIAL

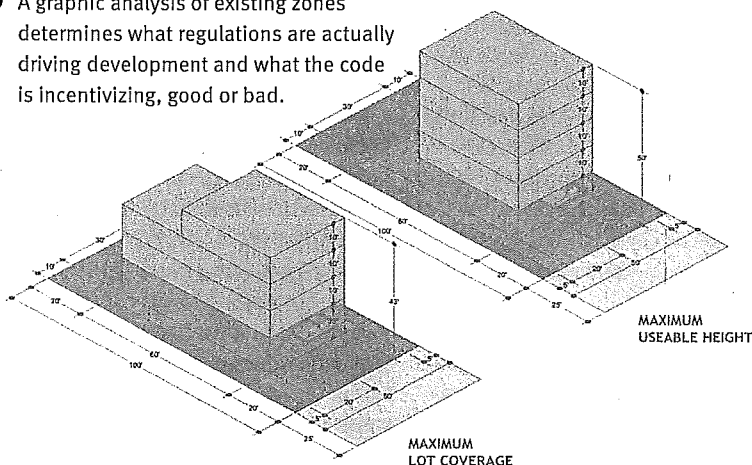
INTENT

- Areas designated as multi-family medium density residential allow single-family, duplex and multifamily structures up to and including low-rise apartment structures. This category allows a maximum density of sixty five (65) units per net acre.
- Allowed within this district, and subject to specific limitations, are supporting services such as places of worship, primary and secondary schools, daycare, community based residential facilities and convenience establishments.

DISTRICT REGULATIONS

| | | |
|--|-----|--|
| LOT AREA (sf) | min | 5,000 sf |
| LOT WIDTH (ft) | min | 50 ft |
| LOT COVERAGE (footprint) | max | 0.4 x GLA |
| FRONTAGE REQUIREMENTS | | N/A |
| FLOOR AREA RATIO - (FAR) | max | 0.75 x GLA |
| GREEN SPACE (open space) | min | 0.15 x GLA |
| DENSITY (units/acre) | max | 65 units per net acre |
| SETBACKS | | |
| • FRONT (ft) | min | 20' |
| • SIDE (ft) | min | 10' |
| • REAR (ft) | min | 10' / 20' abutting LDR |
| PARKING REQUIREMENTS | min | 1/1 bd • 2/2&3 bd • 3/4 bd+ • 1/10 du guests |
| PRINCIPAL BUILDING HEIGHT | max | 50 ft |
| CASE DATA (Standard-Size/ Single-Frontage Lot) | | |
| NET LOT AREA - (NLA) | | 5,000 sf |
| GROSS LOT AREA - (GLA) | | 6,250 sf |
| FLOOR AREA RATIO - (FAR) | | 4,687.5 sf |
| LOT COVERAGE | | 2,500 sf |
| BUILDABLE AREA | | 2,100 sf |
| GREEN SPACE | | 937.5 sf |
| YARDS | | |
| • FRONT (sf) | | 1,000 sf |
| • SIDES (sf) | | 600 sf |
| • REAR (sf) | | 500 sf |

➔ A graphic analysis of existing zones determines what regulations are actually driving development and what the code is incentivizing, good or bad.



ANALYSIS

- R-3 maintains the minimum lot size for the low density residential districts (R-1 & R-2); FAR increases by 20% and DENSITY increases by 72% while the BUILDABLE AREA decreases by 12.5% due to setback changes.
- It should be noted that there is no category allowing for densities between 18 units per acre and 65 units per acre.
- Based on the assumptions of a 50' PROW and a single frontage lot; the LOT COVERAGE is 2,500 sf which exceeds the BUILDABLE AREA of 2,100 sf. Providing more than 4 dwelling units is difficult due to FAR constraints, this encourages lot aggregation.
- R-3 typically yields an open and paved ground floor with a residential program located in a building elevated “on stilts”. There is no requirement for a habitable liner to screen parking from the street.
- Parking becomes a critical concern in R-3 greatly favoring one bedroom units at the expense of larger units desirable for households numbering 3 or more people. Parking constraints limit the density as multilevel parking is impossible on small lots.

nize every proposed project. In addition, the administration and procedures need to build in the right type of flexibility. Flexibility from the current standards is seen as general relief. Flexibility in a good FBC is seen as topical and always relates to the physical form and character of the vision that's being implemented.

Make FBCs Part of Your Economic Development Strategy

With the growing demand for walkable urban places, urbanism should be an important part

of every community's economic development strategy. In a December 2010 *Planning* magazine article titled "Sarasota's Smart Growth Dividend," Peter Katz and Joe Minicozzi, AICP, discussed the economic benefits of compact urban development compared to sprawl, drawing on research from several cities and counties across the country. For example, according to Minicozzi, suburban-style big-box stores yield about \$51,000 in tax revenue per acre to the city of Asheville, North Carolina, while an average six-story mixed use building in

downtown pays more than \$250,000 in taxes per acre to the city. A form-based code is the ideal zoning tool to promote compact, urban development.

Conclusion

Form-based coding is a paradigm shift in zoning to create more walkable, sustainable places. Don't be intimidated. Start small, and let the application of FBCs grow. Be sure not to hesitate to bring in assistance because form-based coding requires a new skill set.

TIPS FOR SELECTING A FORM-BASED CODE CONSULTANT

1. Questions to ask about a firm's FBC experience:

- ◆ Which of your FBCs use form as the organizing principle? Explain how and why the particular system was chosen.
- ◆ How were the form-based zones locally calibrated?
- ◆ Do your FBCs use or rely on design guidelines?
- ◆ How do your FBCs relate to and plug into existing codes?
- ◆ Do your FBCs replace the underlying base zones? If not, what status do the underlying base zones still have?
- ◆ How do you differentiate between regulatory and illustrative drawings in your codes?
- ◆ Explain how thoroughfare standards have been included in your FBCs.
- ◆ Explain how multiday charrettes were integrated into your past coding efforts.
- ◆ Did your code change zone boundaries or use the existing zone boundaries?
- ◆ What zone standards did you find that were obstacles to creating good urban projects/infill, and what did you replace them with?

2. Process/Approach checklist for proposed approach (allows all proposals to be compared equally):

- ◆ Use form (physical character) as organizing principle rather than use.
- ◆ Photograph local or regional precedents for building types, frontage types, and form-based zones/transect zones.

- ◆ Conduct a micro-scale analysis/DNA sampling of local precedent areas.
- ◆ Hold a multiday design charrette to test or further develop the vision.
- ◆ Replace underlying base zones with form-based zones.
- ◆ Create refined/simplified land-use tables.
- ◆ Revise parking requirements and design parameters.
- ◆ Revise residential open space requirements.
- ◆ Determine if landscape requirements are necessary.
- ◆ Rewrite administration and procedures provisions for the FBC area.
- ◆ Determine conflicting regulations for standards that are specific to uses.
- ◆ Vet thoroughfare standards with city engineers, public works staff, or state department of transportation staff (if applicable).
- ◆ Assess and redefine boundaries of existing zones as they are replaced with form-based zones.
- ◆ Use three-dimensional graphics to illustrate flaws in existing development standards.
- ◆ Use maps to analyze connectivity, the figure ground plan, and the larger context (e.g., pedestrian sheds).
- ◆ Prepare detailed illustrative plans with building footprints (using pedestrian sheds as walkability basis).
- ◆ Provide a clear way that the FBC will plug into and relate to the existing zoning code.

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DO YOU KNOW HOW TO
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