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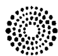

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Preemption/Marijuana—Township zoning ordinance prohibits outdoor cultivation of medical marijuana

Cultivators of medical marijuana argue that ordinance is preempted by the Michigan Medical Marihuana Act

Citation: *Charter Township of York v. Miller, 2018 WL 472187 (Mich. Ct. App. 2018)*

Contributors

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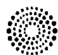

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MICHIGAN (01/18/18)—This case addressed the issue of whether the Michigan Medical Marihuana Act (MCL §§ 333.26421 to 333.26430) permitted outdoor medical marijuana growing, and, if so, whether it preempted a township's zoning regulation prohibiting outdoor growing in residential areas.

The Background/Facts: David Miller and Donald Miller resided at Donald's home in a residential zoning district in York Township (the "Township"). Both were qualified medical marijuana patients under Michigan law. Katherine Null ("Null") had formerly been in a long-term relationship with David. Null was David's registered medical marijuana primary caregiver under Michigan law. In 2014, at Null's direction, David constructed a medical marijuana structure in Donald's backyard "for containing the cultivation of medical marijuana" for patients connected to Null through registration under the Michigan Medical Marihuana Act ("MMMA"), MCL §§ 333.26421 to 333.26430.

At some point, the Township learned that the Millers and Null (collectively, the "Defendants") had built their medical marijuana facility outdoors, and that the Defendants had failed to comply with Township zoning and construction regulations in doing so. In the Township, medical marijuana caregivers were required to comply with the Township's Zoning Ordinance § 40.204, which restricted home occupations and home-based businesses. Zoning Ordinance § 40.204 permitted medical marijuana caregivers to operate as a "home occupation" if they complied with the MMMA and certain specified restrictions. Among other things, § 40.204 required that all medical marijuana be contained inside the house in residential zoned areas, and prohibited medical marijuana caregivers from having or growing any medical marijuana outside the house on properties zoned residential. The ordinance also required permits for modification of any portion of the house for cultivation, growing, or harvesting of marijuana.

The Defendants failed to comply with the Township's Zoning Ordinance § 40.204 because they grew medical marijuana outside and not entirely within Donald's house. The Defendants also failed to obtain a construction permit for the medical marijuana outdoor growing facility, and failed to get permits before installing related electrical and watering systems.

Instead of enforcing the Zoning Ordinance regulations against the Defendants, the Township filed a declaratory judgment action. The Township asked the trial court to determine the validity of its zoning regulations as applied "to the cultivation and use of medical marijuana in zoned residential locations and subdivisions." Specifically, the court was asked to determine whether the MMMA permitted outdoor medical marijuana growing, and, if so, whether the MMMA preempted the

Township's zoning regulation prohibiting outdoor growing in residential areas.

The MMMA governs medical marijuana use in Michigan. It allows the "medical use" of marijuana, including its "cultivation." Specifically, it permits registered caregivers to cultivate 12 marijuana plants for each qualifying patient in an "enclosed, locked facility" including outdoor growing, as specified in MCL 333.26423(d).

The trial court ruled that the Township's Zoning Ordinance's restriction on outdoor growing of marijuana directly conflicted with the MMMA's specific permission of outdoor marijuana cultivation. The trial court ruled that the Township could not exclude outdoor marijuana cultivation because the MMMA permitted doing so.

The Township appealed. On appeal, the Township argued that it had broad zoning authority under Michigan's Zoning Enabling Act ("MZEA") to adopt ordinances to regulate medical marijuana and restrict registered caregiver's marijuana growing to indoors in areas zoned residential.

DECISION: Judgment of Circuit court affirmed.

The Court of Appeals of Michigan disagreed with the Township, and held that the Township's Zoning Ordinance's restriction on outdoor growing of marijuana could not be enforced because it directly conflicted with the MMMA's specific permission of outdoor marijuana cultivation.

The court explained that a municipal "ordinance that purports to prohibit what a state statute permits is void." In other words, when a local regulation directly conflicts with a state statute by prohibiting what the state statute permits, the state statute preempts the local regulation, said the court. Furthermore, the court explained that contrary to the Township's argument, the zoning authority given to municipalities under the MZEA did not save the Township's ordinance from preemption.

Again, the court noted that the MMMA "permit[ted] and thereby authorize[d] registered caregivers to grow medical marijuana for their patients both indoors and outdoors without fear of imposition of penalties by a local government." Thus, the court found that the Township's home occupation Zoning Ordinance § 40.204 "plainly purport[ed] to prohibit the outdoor growing of medical marijuana that the MMMA otherwise permit[ted]." Consequently, the court concluded that the Township's Zoning Ordinance § 40.204 was preempted by the MMMA and void.

See also: *Ter Beek v. City of Wyoming, 297 Mich. App. 446, 823 N.W.2d 864 (2012), judgment aff'd, 495 Mich. 1, 846 N.W.2d 531 (2014).*

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Case Note:
The trial court had also held that the Defendant's enclosed, locked facility must comply with the MMMA (MCL § 333.26423(d)), construction regulations, and the Township's construction permit requirements. The Court of Appeals of Michigan agreed.

Case Note:
In its decision, the Court of Appeals of Michigan made note that although municipalities did not have the authority under the MMMA to adopt ordinances that restrict registered caregivers' MMMA-given rights and privileges, Michigan's Medical Marijuana Facilities Licensing Act does specifically grant municipalities "authority to adopt local ordinances including zoning regulations that restrict the location, number, and type of facilities within its boundaries." (See MCL 333.27205.)

Use/Constitutionality of Regulation/ Second Amendment—Individual is convicted of possessing a firearm within 1000 feet of a public park, which is prohibited under state statute

Individual challenges the statutory firearm restriction as unconstitutional under the Second Amendment

Citation: *People v. Chairez, 2018 IL 121417 (Ill., Feb. 1, 2018)*

ILLINOIS (02/1/18)—This case addressed the issue of whether a provision of an Illinois statute governing unlawful use of a weapon (720 ILCS 5/24-1(a)(4), (c)(1.5)), prohibiting possession of a firearm within 1000 feet of a public park was unconstitutional under the Second Amendment.

The Background/Facts: In April 2013, Julio Chairez ("Chairez") pled guilty in circuit court to possessing a firearm within 1000 feet of a

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public park. Section 24-1(a)(4), (c)(1.5) of Illinois' unlawful use of a weapon ("UUW") statute (720 ILCS 5/24-1(a)(4), (c)(1.5)) prohibited an individual from carrying or possessing a firearm within 1000 feet of a public park. In November 2015, Chairez filed a post-conviction petition, seeking to vacate his conviction on the basis that the statute was unconstitutional under the Second Amendment to the United States Constitution (U.S. Const., amend. II).

The Second Amendment to the United States Constitution provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." (U.S. Const., amend. II.) That right is "fully applicable to the States" through the Fourteenth Amendment to the United States Constitution (U.S. Const., amend. XIV).

In his petition, Chairez argued that an individual who is barred from carrying a firearm within 1000 feet of the many locations listed in section 24-1(c)(1.5) of the UUW statute (including public parks) is essentially barred from carrying a firearm in public. As such, he argued that section 24-1(c)(1.5) was essentially a blanket prohibition on carrying a gun in public, in violation of the Second Amendment.

The circuit court agreed, holding that section 24-1(a)(4), (c)(1.5) of Illinois' UUW statute was unconstitutional because a 1000-foot firearm restriction was "not a reasonable regulation of the [S]econd [A]mendment," but rather was effectively a "near comprehensive ban" on carrying a firearm in public.

The State of Illinois (the "State") appealed. The State argued that the restriction on carrying a firearm within 1000 feet of a public park was not an unconstitutional blanket prohibition, but rather was a reasonable regulation that prevented people from carrying firearms only in certain proscribed areas.

DECISION: Judgment of circuit court affirmed in relevant part.

The Supreme Court of Illinois held that section 24-1(a)(4), (c)(1.5) of Illinois' UUW statute, which prohibited possession of a firearm within 1000 feet of a public park was facially (i.e., on its face; based on the language of the statute alone and not just its applicability) unconstitutional in violation of the Second Amendment to the United States Constitution.

In so holding, the court: (1) conducted "a textual and historical analysis of the [S]econd [A]mendment 'to determine whether the challenged law impose[d] a burden on conduct that was understood to be within the scope of the [S]econd [A]mendment's protection at the time of ratification;' " and (2) having found that the 1000-foot prohibition was within the scope of the Second Amendment's protection, applied "the appropriate level of heightened means-ends scrutiny and consider[ed] the strength of the government's justification for restricting or regulating the exercise of [S]econd [A]mendment rights."

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Applying the first step of its analysis, the court explained that the United States Supreme Court had determined that there is an "individual right to possess and carry weapons on the case of confrontation," based on the Second Amendment, but that such a right is "not unlimited." The court also explained that the United States Court of Appeals, Seventh Circuit, (which has jurisdiction over Illinois) had found a blanket prohibition on carrying firearms in public in Illinois was unconstitutional under the Second Amendment, but had also stated that state bans on guns "merely in particular places" might be constitutional if the weight of analysis showed a great public benefit on such a ban. The Supreme Court of Illinois, itself, had held that the Second Amendment "protects an individual's right to carry a ready-to-use gun outside the home, subject to certain regulations."

To determine whether the offense of possessing a firearm within 1000 feet of a public park (as set forth under section 24-1(a)(4), (c)(1.5) of the UUW statute) "impermissibly encroache[d] on conduct at the core of the [S]econd [A]mendment," the court applied a "sliding" scrutiny scale. Under such scrutiny, explained the court, "the closer in proximity the restricted activity is to the core of the [S]econd [A]mendment right and the more people affected by the restriction, the more rigorous the means-end review."

Applying that scrutiny here, the court found that the 1000-foot firearm restriction "directly implicate[d] the core right" to the "carriage of weapons in public for self-defense, thereby reaching the core of the [S]econd [A]mendment." The court found that the firearm restriction here not only "cover[ed] a vast number of public areas across the state, it encompass[ed] areas . . . where an individual enjoys [S]econd [A]mendment protection, *i.e.*, public ways." Moreover, the court found that the restriction at issue affected the "entire law-abiding population of Illinois." All of that, concluded the court, required an "elevated intermediate scrutiny," under which the State bore the "burden of showing a very strong public-interest justification and a close fit between the government's means and its end, as well as proving that the 'public's interests are strong enough to justify so substantial an encumbrance on individual Second Amendment rights.' "

Here, the State claimed a compelling interest in public safety was served by reducing firearm possession within 1000 feet of a public park. Specifically, the State noted the large number of children who frequent public parks, and contended that a 1000-foot firearm restriction around public parks would extend the distance where a shooter might fire a weapon, thus protecting children and others.

While the court acknowledged that preventing crime and protecting children were "important public concerns," the court found that the State failed to provide evidentiary support for its claims that prohibit-

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ing firearms within 1000 feet of a public park would reduce the risks to children and others. In other words, the court found that the State had "speculated" that the proximity of firearms within 1000 feet threatened the health and safety of those in public parks, but had failed to provide "a valid explanation for how the law actually achieves its goal of protecting children and vulnerable populations from gun violence." With such failure to justify the restriction on gun possession within 1000 feet of a public park, the court concluded that the State failed to bear its "burden" of justifying such a "substantial an encumbrance on individual Second Amendment rights"—and that therefore the restriction was facially unconstitutional.

Having found the UUW provision under which Chairez was convicted to be unconstitutional, the court affirmed the circuit court's judgment vacating Chairez's Class 3 felony conviction.

See also: *District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).*

See also: *Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012).*

See also: *Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011).*

Case Note:

The Supreme Court of Illinois also concluded that the unconstitutional provision of the UUW, prohibiting possession of a firearm within 1000 feet of a public park, was severable from the remaining portions of the UUW. The statute had also identified several other specific locations from which possession of a firearm within 1000 feet of such locations was prohibited (e.g. "on any public way within 1,000 feet of the real property comprising any school, . . . courthouse, public transportation facility, or residential property owned, operated, or managed by a public housing agency or leased by a public housing agency as part of a scattered site or mixed-income development." (720 Ill. Comp. Stat. § 24-1(c)(1.5))). Having found the unconstitutional portion of the statute (i.e., prohibiting possession of a firearm within 1000 feet of a public park) severable from the rest of the statute (which had not also been challenged as unconstitutional), the court held that the remaining specific location-regulations were capable of being executed.

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Preemption/Manufactured Home Park—City enforces zoning code in manufactured home park

Park residence contends federal and state law preempts zoning code enforcement in manufactured home parks

Citation: *Eich v. City of Burnsville, 2018 WL 313087 (Minn. Ct. App. 2018)*

MINNESOTA (01/8/18)—This case addressed the issue of whether a city's enforcement of its zoning code within a manufactured home park was preempted by the federal National Manufactured Housing Construction and Safety Standards Act and/or Minnesota's Manufactured Home Building Code.

The Background/Facts: In May 2015, the City Code Inspector for the City of Burnsville (the "City") inspected a manufactured home park, Rambush Estates. The City Code Inspector thereafter issued zoning code violation notices related to nonconforming structure setbacks, awnings, and location of trash containers. In response, Kathryn Eich ("Eich"), a resident of Rambush Estates commenced a class action against the City seeking damages and injunctive relief. Among other things, Eich argued that the City's enforcement of its zoning code within Rambush Estates was preempted by federal and state law.

Eich pointed to the federal National Manufactured Construction and Safety Standards Act (the "Act") and Minnesota's Manufactured Home Building Code (the "MHBC"). The federal Act preempts states and political subdivisions—like the City, here—from enacting "any standard regarding the construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard." Standards promulgated under the Act by the Department of Housing and Urban Development ("HUD") prohibit local regulations that "impair[ ] the Federal superintendence of the manufactured home industry as established by the Act." In other words, the Act expressly prohibits states and municipalities from regulating the "construction or safety" of manufactured homes in any manner that is not identical to federal HUD standards. The MHBC incorporates those identical federal standards concerning the safety and construction of manufactured homes.

Ultimately, the district court concluded that the City's zoning code enforcement within Rambush Estates was: (1) expressly preempted by

the Act; and (2) was expressly and field preempted by the MHBC. The district court ruled that the enforcement of the City code in manufactured home parks was preempted and that the City was permanently enjoined form enforcing any City code within Rambush estates.

The City appealed, seeking the ability to enforce its City code within Rambush Estates. On appeal, the City argued that it was expressly authorized by state law to enforce its codes within manufactured home parks when the codes were not inconsistent with federal or state laws.

The Court's DECISION: Judgment of district court reversed.

Reversing the district court, and agreeing with the City, the Court of Appeals of Minnesota held that neither federal nor state laws (i.e., the Act and the MHBC) preempted the City zoning code within Rambush Estates.

In so holding, the appellate court explained that federal or state laws may preempt local laws in three ways: "(1) express preemption, where a federal or state statute explicitly defines the extent to which it preempts local law; (2) field preemption, where a local law attempts to regulate conduct in a field that the federal or state legislature intended federal or state law to exclusively occupy; and (3) conflict preemption, where a local law permits what a federal or state statute forbids or vice versa."

Here, the appellate court found that the district court had failed to explain why particular City code provisions were found to be inconsistent with the federal Act. The appellate court noted that the district court had stated that the City's "code enforcement conflicts . . . [by] imposing fines inconsistent with Congress's objective to maintain affordability of this vital form of housing as expressed in [the Act] and adopted by the State of Minnesota." The appellate court disagreed, finding the district court "erred in its interpretation of the Act." The appellate court noted that the federal Act did not preempt enforcement of all codes, but only preempted enforcement of codes that attempted to regulate construction or safety standards that were inconsistent with the Act's standards. In other words, the appellate court found that the Act did "not preempt the [C]ity from enforcing its [C]ity code within Rambush Estates because the Act [was] limited to consumer protection, and the [C]ity code [did] not purport to regulate within that construction or safety standards context." In fact, the appellate court found that none of the City's regulated items—of carports, awnings, zoning setbacks, trash screening, and exterior storage—within a manufactured home park related to the construction or safety of the manufactured home itself. Therefore, the appellate court concluded that the Act did not expressly preempt the relevant City code provisions, of which Eich had challenged enforcement.

Since the MHBC adopted the identical federal standards of the Act,

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the appellate court concluded that, "[f]or the same reasons that federal law does not expressly preempt the [C]ity from enforcing its zoning and property maintenance codes within Rambush Estates, the MHBC does not expressly preempt the [C]ity's zoning and property maintenance codes from being enforced within Rambush Estates." Moreover, the appellate court found that a provision in the code-compliance section of the MHBC expressly authorized local code enforcement that is outside the context of construction and safety. Specifically, that provision provides: "Nothing in this section shall be construed to inhibit the application of zoning, subdivision, architectural, or [a]esthetic requirements . . . .")(See Minn. Stat. § 327.32, subd. 5.)

The appellate court further found that, contrary to the district court's holding, Minnesota statutes did not field preempt the City's zoning code enforcement in manufactured home parks. Rather, noted the appellate court, Minnesota statutes explicitly protect city authority within manufactured home parks: Minn. Stat. § 327.32, subd. 5, specifies that a city is permitted to apply "zoning, subdivision, architectural, or [a]esthetic requirements" within a manufactured home park, and Minn. Stat. § 327.26, subd. 2 (2016), explicitly permits cities to enforce ordinances relating to the safety and protection of people within a manufactured home park. Thus, the court concluded that since state law explicitly authorizes municipalities to regulate within manufactured home parks, state law has not fully occupied the field of manufactured-home-park regulation, and the district court erred in holding the contrary and concluding that the City could not enforce its zoning and property maintenance codes within Rambush Estates.

Case Note:

Eich had also brought as-applied due-process claims. However, the court found that those claims were "moot with respect to injunctive relief."

Zoning News from Around the Nation

CALIFORNIA

In an effort to meet the "current housing crisis," California State Senator Scott Wiener has introduced the Transit Zoning Bill, SB 827. The bill "would allow new housing near major transit hubs to be built up to eight stories tall, overriding local zoning restrictions." The bill would "set statewide standards for height, density and eliminate any

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mandates for required parking when it comes to future projects built in the state near transit stops." Wiener argues that "linking denser development with transit" will "add more affordable, sustainable units to a state desperately in need."

Source: *Curbed;* www.curbed.com

Source: *Long Beach Post;* https://lbpost.com

INDIANA

In early February, the Indiana House of Representatives passed House Bill 1289. The bill would limit local bans and regulations of "natural resources development," including mining and timber harvesting. The bill is now pending before the Senate Committee on Natural Resources.

Source: *Courier & Press;* www.courierpress.com

TENNESSEE

Pending in the Tennessee General Assembly, Senate Bill 1086 would "prohibit local governments from using zoning powers to determine the extent to which short-term rentals should be allowed in their communities." Among other things, the bill would prohibit municipalities from: prohibiting the use of property as a short-term rental unit; and restricting the use of or otherwise regulating a short-term rental unit based on the short-term rental unit's classification, use, or occupancy.

Source: *Brentwood Home Page;* https://brentwoodhomepage.com

Source: *Senate Bill 1086;* www.capitol.tn.gov

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Fair Housing—City rejects zoning application for family care residence for disabled individuals

Residents sue, arguing city's failure to reasonably accommodate disabled individuals violates Fair Housing Act

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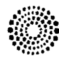

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Citation: *Valencia v. City of Springfield, Illinois, 2018 WL 1095954 (7th Cir. 2018)*

The Seventh Circuit has jurisdiction over Illinois, Indiana, and Wisconsin.

SEVENTH CIRCUIT (ILLINOIS) (03/01/18)—This case addressed the issue of whether residents and operators of a "family care residence," which housed disabled individuals, showed a "reasonable likelihood of success" on their claim that the city, in denying their requested conditional permitted use to operate the family care residence within 600 feet of another such facility, failed to make a reasonable accommodation for the disabled residents in violation of the federal Fair Housing Act.

The Background/Facts: Christine and Robyn Hovey (the "Hoveys") owned a single-family dwelling in a residential district in the City of Springfield (the "City"). Beginning in March 2014, the Hoveys began renting their home to three disabled individuals, who were all clients of Individual Advocacy Group, Inc. ("IAG"), a non-profit organization that provided residential services to adults with disabilities.

Under the City's zoning code (the "Code"), the residential district in which the Hoveys' home was located allowed both single-family detached residences and family care residences. The Code defined "family care residences" as a single-family dwelling unit occupied "in a family-like environment by a group of no more than six unrelated persons with disabilities, plus paid professional support staff provided by a sponsoring agency . . . , and compli[ant] with the zoning regulations for the district in which the site is located." The Code restricted family care residences to a zoning lot located "more than 600 feet from the property line of any other such facility." However, the Code allowed non-compliant family care residences to qualify for a Conditional Permitted Use ("CPU") if the family care residence: (1) would not have any adverse impact upon residents of nearby facilities; and (2) would not have any detrimental effect upon "privacy, light, or environment" of surrounding residences.

In August 2016, the City notified the Hoveys that their home was located within 600 feet of another family care residence. The Hoveys had previously been unaware that a family care residence had been operating across the street—and within 157 feet—of their home for approximately 12 years. The City informed the Hoveys that the residents of their home would be evicted unless the Hoveys applied for and received a CPU.

In October 2016, the Hoveys and IAG submitted a joint applica-

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tion for a CPU. Ultimately, the City Zoning and Planning Commission denied the CPU. The City Council later affirmed that denial.

A resident of the Hoveys' house and IAG (collectively, the "Plaintiffs") then sued the City. They alleged that the City discriminated against the Hovey home residents on the basis of their disabilities in violation of the Fair Housing Act ("FHA") (42 U.S.C.A. §§ 3601-31), Americans with Disabilities Act ("ADA") (42 U.S.C.A. §§ 12101-213), and § 504 of the Rehabilitation Act of 1973 (29 U.S.C.A. § 794(a)).

Pursuant to the Fair Housing Amendment Act of 1988 ("FHAA"), the FHA makes it unlawful "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap." (42 U.S.C.A. § 3604(f)(1).) Similarly, Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." (42 U.S.C.A. § 12132.) And, under the Rehabilitation Act, "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." (29 U.S.C.A. § 794(a).) Pursuant to case law, all three statutes apply to municipal zoning decision, and a plaintiff may prove a violation of the FHA, ADA, or Rehabilitation Act by showing: (1) disparate treatment; (2) disparate impact; or (3) a refusal to make a reasonable accommodation.

Here, the Plaintiffs claimed that: (1) the City Code facially discriminated against disabled individuals because it imposed a 600-foot spacing requirement on unrelated disabled persons living in family care residences, but not on unrelated non-disabled persons living in single-family dwellings; (2) even if the 600-foot spacing requirement was facially neutral, it had a disparate impact on persons with disabilities; and (3) by refusing to grant the Hovey's home a CPU, the City failed to make a reasonable accommodation. The Plaintiffs sought monetary damages and an order directing the City to grant their requested CPU and permanently refrain from treating the Hovey home as a non-conforming use under the Code.

In January 2017, the Plaintiffs moved for a preliminary injunction to enjoin the City from instituting eviction proceedings against the Hovey home residents during the pendency of the case. They limited the bases of their motion to their theories of disparate treatment and reasonable accommodation.

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The City contended that the Plaintiffs' injunction should be denied because the Plaintiffs had failed to demonstrate a reasonable likelihood of success on the merits. A court will only grant a preliminary injunction after a two-party analysis, involving a threshold phase and then a balancing phase. To survive the threshold phase, a party seeking a preliminary injunction must satisfy three requirements, one of which requires a showing that "its claim has some likelihood of succeeding on the merits."

Here, the district court rejected the City's argument that the Plaintiffs failed to make such a showing. The court granted the Plaintiffs' motion for a preliminary injunction, finding that the Plaintiffs possessed a reasonable likelihood of success under both a theory of disparate treatment and a theory of reasonable accommodation.

The City appealed.

DECISION: Judgment of district court affirmed.

Focusing on the Plaintiffs' reasonable accommodation claim, the United States Court of Appeals, Seventh Circuit, held that the Plaintiffs had shown a "better than negligible" likelihood of success on the merits of their reasonable accommodation theory, and therefore were entitled to a grant of a preliminary injunction, to enjoin the City from instituting eviction proceedings against the Hovey home residents during the pendency of the case.

In so holding, the court explained that the FHA applies to municipal zoning decisions, and the FHAA "requires public entities to reasonably accommodate a disabled person by making changes in rules, policies, practices or services as is necessary to provide that person with access to housing that is equal to that of those who are not disabled." More specifically, noted the court, "[t]he FHAA requires accommodation if such accommodation (1) is reasonable, and (2) necessary, (3) to afford a handicapped person the equal opportunity to use and enjoy a dwelling." The court explained that "[a]n accommodation is reasonable if it is both efficacious and proportional to the costs to implement it," but is unreasonable if it "imposes undue financial or administrative burdens or requires a fundamental alteration in the nature of the program."

Here, the court found that the CPU sought by the Plaintiffs would afford the Hovey home residents an equal opportunity to establish a residential home. Since a community-based residential facility is often the "only means by which disabled persons can live in a residential neighborhood," the court said that "[w]hen a zoning authority refuses to reasonably accommodate these small group living fa-

cilities, it denies disabled persons an equal opportunity to live in the community of their choice." Regarding "reasonableness and necessity," the court found that the Hovey home was: "necessary to fulfill 'IAG's mission to provide residential services to disabled adults in a community-based setting' "; and "reasonable" in that "it would plainly effectuate that mission," and "would further advance the integration of disabled individuals into the [City] community." Moreover, the court found those benefits "likely outweigh[ed] the potential costs of implementation," as the court found that the financial and administrative burden on the City was "negligible" and there was insufficient evidence of intangible costs to the neighborhood.

See also: *Oconomowoc Residential Programs v. City of Milwaukee, 300 F.3d 775, 13 A.D. Cas. (BNA) 681 (7th Cir. 2002).*

Special Exception—Lessee of land applies for special exception to construct wireless communications tower

Opponents of tower argue that lessee is not a "landowner" and thus cannot be a zoning "applicant"

Citation: *SBA Towers IX, LLC v. Unity Township Zoning Hearing Board, 2018 WL 910842 (Pa. Commw. Ct. 2018)*

PENNSYLVANIA (02/16/18)—Among other things, this case addressed the issue of whether a holder of an option agreement was a "landowner" such that the entity had standing to file an application for a special exception.

The Background/Facts: Columbus Home Association ("Columbus") owned an 8.9-acre parcel of land (the "Property") in an R-1 zoning district in Unity Township (the "Township"). SBA Towers IX, LLC ("SBA Towers") entered into an Option and Land Lease Agreement ("Option Agreement") with Columbus for the lease of a 100-foot by 100-foot section of the Property, which would be used for the construction, support, and operation of a wireless com-

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munications tower facility. The Township Zoning Ordinance (the "Ordinance") permitted communications towers in an R-1 zoning district by special exception, as long as the special exception applicant established criteria set forth in the Ordinance.

In January 2016, SBA Towers and Pittsburgh SMSA Limited Partnership d/b/a Verizon Wireless ("Verizon")) filed an application for a special exception to construct a 150-foot monopole communications tower on the Property. Ultimately, the Township's Zoning Hearing Board (the "ZHB") denied the special exception application.

SBA Towers appealed the ZHB's decision to the Court of Common Pleas. The Court of Common Pleas reversed the ZHB's decision, concluding that substantial evidence did not support the ZHB's findings on various issues.

Thereafter, Dr. Chris and Jill Bellicini, James and Megan McIntosh, Edward and Kathy Sobota, and Christopher and Lynn Schmauch (collectively, the "Appellants") appealed the Court of Common Pleas' order. Among other things, the Appellants argued that SBA Towers lacked standing to file the special exception application with the ZHB. Specifically, the Appellants argued that SBA Towers was not a "landowner," as defined under Section 107 of the Pennsylvania Municipalities Planning Code ("MPC"), and thus did not have standing to file zoning applications for the Property.

Section 107 of the MPC defines "applicant" as "a landowner or developer . . . who has filed an application for development." It defines "landowner" as "the legal or beneficial owner or owners of land including the holder of an option or contract to purchase[,] . . . a lessee if he is authorized under the lease to exercise the rights of the landowner, or other person having a proprietary interest in land."

In response, SBA Towers (and Verizon, which had been allowed to intervene in the appeal) argued that SBA Towers was an "applicant" under Section 107 of the MPC that had standing to file the special exception application because it was the holder of an option contract that was authorized to exercise the rights of the landowner (here, Columbus). SBA Towers and Verizon argued further that the Option Agreement in this case "explicitly grant[ed] [SBA Towers] permission to exercise the rights of the landowner" because SBA Towers was authorized to obtain the necessary governmental approvals for the construction of the proposed communications tower.

DECISION: Judgment of Court of Common Pleas reversed (on other grounds).

The Commonwealth Court of Pennsylvania concluded that SBA

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Towers was "a landowner and a proper applicant under Section 107 of the MPC and, thus, had standing to file the [special exception] [a]pplication with the ZHB."

The court so concluded upon analysis of the language of the lease option agreement between SBA Towers and Columbus. The court found that, "[w]hile the Option Agreement in this case [did] not specifically provide SBA Towers with an 'exclusive easement,' the Option Agreement [did] grant SBA Towers 'the right to enter the [Property] to conduct tests and studies . . . to determine the suitability of the [Property] for [SBA Towers'] intended use.' " The court also found that the Option Agreement here required SBA Towers to "obtain any necessary governmental licenses or authorizations required for the construction and use of" the proposed communications tower. The court concluded that such language made it "clear that SBA Towers [was] more than just a potential leaseholder." Rather, the court found that the Option Agreement specifically authorized SBA Towers to exercise Columbus' rights as the owner of the Property.

The court, however, went on to determine that evidence was insufficient to establish that SBA Towers was licensed by the Federal Communications Commission ("FCC"), or that the proposed communications tower would be in compliance with FCC standards. As such, the court reversed the Court of Common Pleas' reversal of the ZHB's decision to deny SBA Towers' special exception application.

See also: *Tioga Preservation Group v. Tioga County Planning Com'n, 970 A.2d 1200 (Pa. Commw. Ct. 2009).*

Religious Rights—Religious youth camp challenges grant of special exception to neighbor dairy operation

Camp contends grant of special exception violates its religious rights under federal and state law

Citation: *House of Prayer Ministries, Inc. v. Rush County Board of Zoning Appeals, 2018 WL 414862 (Ind. Ct. App. 2018)*

INDIANA (01/16/18)—This case addressed the issue of whether a

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special exception to zoning ordinances was proper. Among other things, the case addressed whether a zoning board's grant of a special exception violated a religious summer youth camp's religious rights under federal and state law.

The Background/Facts: In Rush County (the "County"), Milco Dairy Farm, LLC ("Milco") sought to construct and operate a concentrated animal feeding operation ("CAFO"), which was to consist of a dairy operation maintaining 1,400 head of cattle. In furtherance of those plans, Milco filed with the County's Board of Zoning Appeals ("BZA") a petition for a special exception from the County's zoning ordinances. The BZA ultimately granted Milco's special exception, subject to various conditions of approval.

House of Prayer Ministries, Inc., d/b/a Harvest Christian Camp ("House of Prayer") owned property one-half mile downwind from Milco's proposed CAFO. On its property, House of Prayer operated a religious summer youth camp. House of Prayer objected to Milco's special exception request. House of Prayer argued that the 17.4 million gallons of waste produced by the CAFO, which was to be stored on Milco's property in open-air lagoons, would be "dangerous to attendees at House of Prayer's events and that the prevailing winds in the area would make the CAFO both a nuisance to House of Prayer and a risk to its attendees." House of Prayer also asserted that the construction of the CAFO would diminish the property value of House of Prayer's property.

House of Prayer appealed the BZA's decision that granted the special exception to Milco. House of Prayer alleged that the BZA, in issuing the special exception, failed to properly: evaluate the public interest; consider the impact on surrounding properties; and consider setback requirements. House of Prayer also alleged that the BZA's decision to grant the special exception to Milco violated House of Prayer's religious rights under the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA") (42 U.S.C.A. §§ 2000cc to 2000cc-5), Indiana's Religious Freedom Restoration Act ("RFRA") (Ind. Code §§ 34-13-9-1 to -11), and/or Article 1, Sections 2 and 3 of the Indiana Constitution.

The circuit court denied House of Prayer's petition for judicial review and request for declaratory judgment.

House of Prayer appealed.

DECISION: Judgment of Circuit Court affirmed.

The Court of Appeals of Indiana held that the BZA had properly issued the special exception to Milco, and, in doing so, had not violated House of Prayer's religious rights under federal or state law.

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Pursuant to the County's zoning ordinance, the BZA, when determining whether to issue the special exception, was required to, among other things: (1) conclude that the special exception would not adversely affect the public interest; (2) consider the impact on other property owners; and (3) properly consider setback requirements, including a one-mile setback of CAFO's from schools. Contrary to House of Prayer's assertions, the appellate court determined that the BZA had properly applied those considerations when it issued the special exception to Milco. Specifically, the court concluded that: (1) the BZA had properly considered the affect of the CAFO on the public interest, and had applied conditions on the special exception approval to ensure that the CAFO would not adversely affect the public interest; (2) the BZA had properly considered the impact on other property owners, and had determined that the CAFO use was compatible with the adjacent properties in the agricultural zoning district; and (3) the BZA did not err when it permitted Milco's CAFO to be located one-half mile, rather than one full mile, from House of Prayer's property because the BZA's determination that the House of Prayer's youth summer camp was not a "school" within the ordinance was not an interpretation that was inconsistent with or contrary to the ordinance itself.

In rejecting House of Prayer's claims that the BZA's grant of the special exception violated House of Prayer's religious rights under federal and state laws, the appellate court addressed each of those laws in turn.

The court explained that the federal RLUIPA provides that "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden" is both "in furtherance of a compelling government interest" and "the least restrictive means of furthering that compelling government interest." (42 U.S.C.A. § 2000cc(a)(1).) RLUIPA further provides that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." (42 U.S.C.A. § 2000cc(b)(1).) RLUIPA defines a "land use regulation" in relevant part as "a zoning . . . law, or the application of such a law, that limits or restricts a claimant's use . . . of land . . . , if the claimant has . . . [a] property interest in the regulated land . . . ." (42 U.S.C.A. § 2000cc-5(5).)

House of Prayer had asserted that the BZA's decision to grant the special exception to Milco was a "substantial burden" on House of

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Prayer's religious exercise in violation of RLUIPA because it "imperiled the health of the children" at House of Prayer's religious youth summer camp. The court disagreed. It held that RLUIPA did not apply to House of Prayer here because House of Prayer did not have "a property interest in the regulated land." The court noted that RLUIPA applies to land use regulations imposed by a government directly on religious groups, and explained that the land regulated by special exception here was wholly owned by Milco. Since House of Prayer had no property interest in the land being regulated, it could not rely on RLUIPA held the court.

House of Prayer had asserted that "regulated land" in RLUIPA meant any land that was "affected" by a regulation, even if the regulation was specifically direct to land in which the claimant (such as House of Prayer, here) has no interest. As a matter of first impression (i.e., the first time Indiana courts ruled on the issue), the court rejected such an interpretation that RLUIPA was "available to any property owner whose interests might be affected by a given regulation," concluding instead that RLUIPA is only available to claimants who have a property interest in the land that is being regulated.

Further, the court explained that, similar to RLUIPA, Indiana's RFRA (Ind. Code §§ 34-13-9-1 to -11), as well as Article 1, Sections 2 and 3 of the Indiana Constitution, prohibited a governmental entity from substantially burdening religious exercise. The court found that, here, substantial evidence supported the BZA's conclusion that the House of Prayer would not be substantially burdened in the exercise of its religion by the grant of the special exception. Accordingly, the court concluded that House of Prayer's claims under RFRA and the Indiana Constitution failed.

Zoning News from Around the Nation

MARYLAND

Montgomery County is considering amendment zoning laws to support community solar installations. The proposed zoning text amendment would allow community solar energy installations with a capacity of up to 2 Megawatts. Currently, Montgomery County's zoning code restricts solar projects to a limited use in nearly all zones and limits solar energy production to 120% of on-site energy consumption.

Source: *Solar Industry; https://solarindustrymag.com*

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MASSACHUSETTS

Worcester City Manager Edward M. Augustus Jr. reportedly "wants to ban recreational marijuana retail stores, cultivators, manufacturers and related establishments from all residential-zoned areas and preclude them from being located within 500 feet of schools, public parks, playgrounds, licensed day care centers and public libraries." Augustus has proposed zoning amendments that would allow recreational marijuana establishments only by special permit in areas zoned for manufacturing and business uses, as well as in Institutional-Hospital zones and in the Airport zone. Municipalities are moving forward on marijuana-related zoning regulations as Massachusetts' Cannabis Control Commission is scheduled to begin accepting applications for recreational marijuana establishments on April 1.

Source: *Worcester Telegram*; www.telegram.com

NEW JERSEY

The City of Woodbury's City Council has "unanimously approved" making permanent what had been a two-year pilot program, allowing property owners to keep chickens. Under the new ordinance, property owners must pay a $10 annual license fee and can keep up to 12 hens. The ordinance also continues a Chicken Advisory Board to ensure chicken owners comply with the ordinance.

Source: *NJ.com*; www.nj.com

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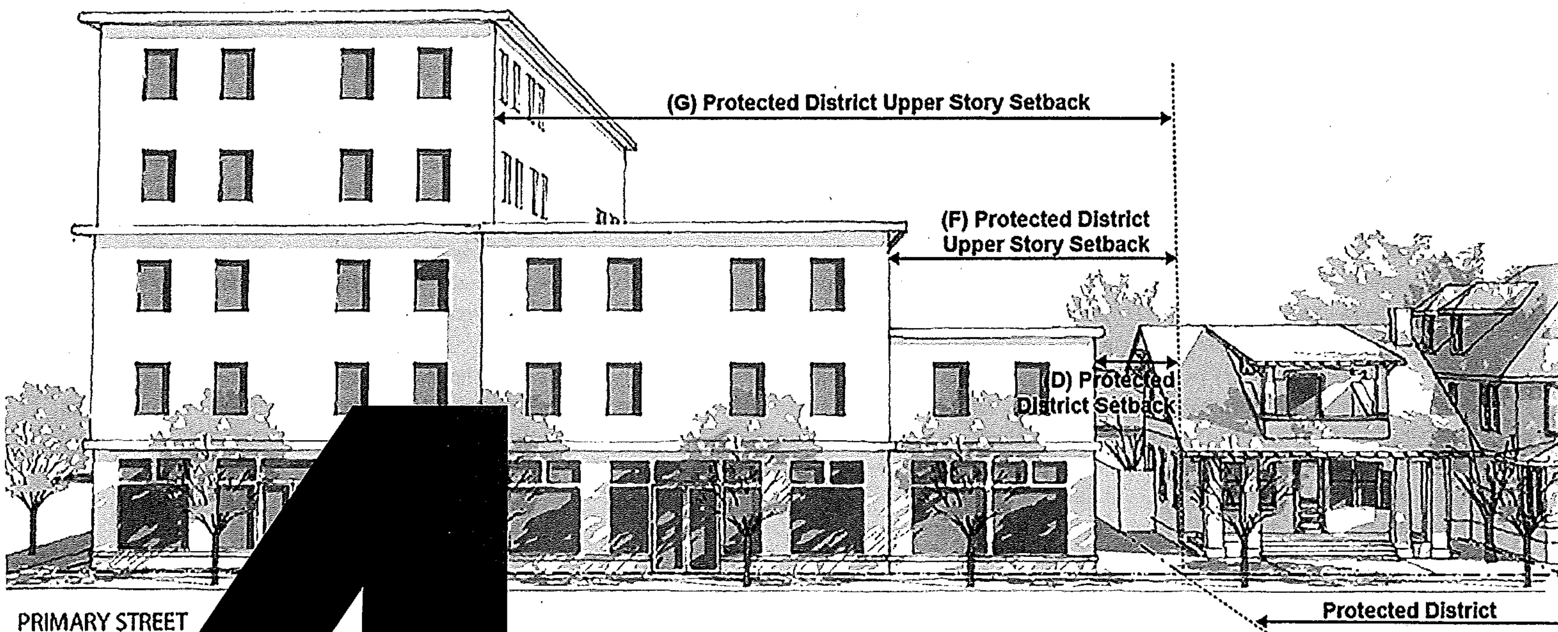
PRACTICE FORM-BASED ZONING



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Living with Your Form-Based Code

By Nancy Stroud, AICP, and Elizabeth Garvin, AICP

Form-based codes (FBCs) have been available as a zoning approach in various incarnations for about 30 years. According to the Code Study, a collaborative effort to track the development and adoption of form-based codes, as of February 2017, there were 654 codes that met the criteria for form-based codes established by the Form-Based Codes Institute, 344 of which have been adopted. While the study lists codes from 48 states, more than one-third of all form-based codes in the U.S. are in just four states: Florida, California, Texas, and Virginia. So, depending on where you work as you read this, you may not have seen a form-based code in action in your part of the world yet. Like previous "new" approaches to zoning, such as planned unit development, performance zoning, and conditional zoning, this design-based method of regulation has moved along the zoning continuum from its outsider start to its current status as a fairly mainstream and well-recognized tool.

Many in the planning and design community recognize the value of form-based codes in providing improved regulatory specificity about the built environment. A great deal of time and effort on the part of planners, developers, architects, and the community goes into adopting a new form-based code. Waiting offstage and outside of the footlights, though, is the drama of implementing and using the new regulations. Most communities have the systems in place to implement an updated traditional code. Form-based codes, however, are more than a little different than traditional codes when it comes to project review. If a community's current application review process is not already heavily design oriented, the process and the people involved in the process may need to change to accommodate the new review requirements.

This article will focus on preparing for and living with the day-to-day administration of a form-based zoning code. After a brief description of the typical form-based code, we will discuss how to introduce the code to essential internal and external users, with a particular emphasis on training (for both staff and the development community), education of elected and appointed officials, and vigorous public outreach and communication. Then we'll explore a variety of situations where conflicts often arise during the development review process, and what practical methods may address and resolve them. Finally, we'll discuss the process of adjusting the new code as necessary and appropriate.

IMPLEMENTATION STARTS WITH DRAFTING

The FBC implementation process starts with keeping track of the multiple changes from a traditional to a form-based regulatory approach that are made during the drafting process and that will be reflected in both how a site is designed and how it is reviewed. These changes can be generally categorized as changes that need to be highlighted and changes that need to be taught. For example, changing from a setback line to a build-to line may just need to be illustrated in the regulations and highlighted through the public outreach process. Changing from a setback line to a block-based contextual setback may need to be taught. Teaching should take place throughout the drafting process, should be the subject of focus in post-adoption training, and can best be supplemented with a user's manual that is produced in conjunction with the new regulations.

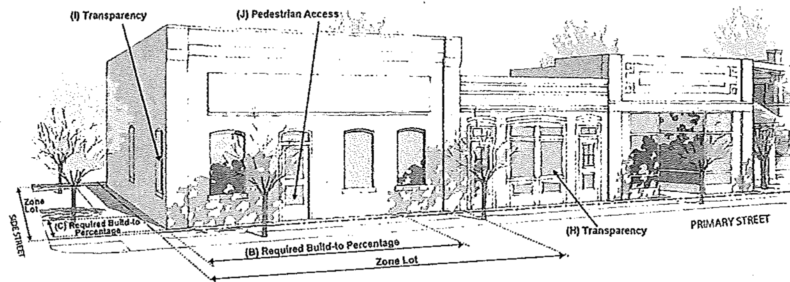
Components of Form-Based Codes

A typical form-based code has three key component parts; the careful drafting of each is critical to ensuring a (more) smooth implementation process.

The **Regulating Plan** is comparable to an area plan or specific plan that establishes a very specific future development map. A regulating plan has characteristics similar to a detailed development plan or preliminary plat. The only difference is that creation of the regulating plan usually precedes development, whereas the development or plat are part of the approval process. The regulating plan pulls together both the building form standards and the public space standards described below and applies them to the community, typically at the lot or block level.

Unlike many site-layout regulations in a traditional zoning code, particularly an older zoning code, which are either generally applicable or mix-and-match depending on the use, form-based regulations are place specific. A clear regulating plan helps both staff and the applicant apply the correct regulations to the parcel. Where a community chooses not to adopt regulating plans, it is critical to identify how the various parts of the form regulations work together so an applicant understands, for example, that an urban form frontage cannot be mixed with a suburban form parking lot design.

Building Form Standards are the regulatory requirements for the various individual building types recognized in the community. Many of the standards contained in the building envelope standards are also included in traditional regulations, but the physical design focus of form-based codes elevates the importance of these standards.



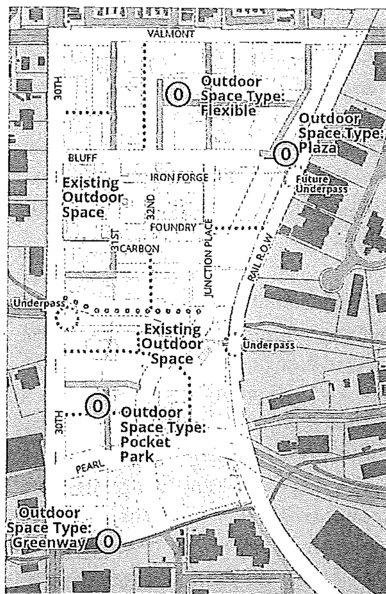
City and County of Denver Community Planning and Development

This illustration from Denver's zoning code highlights select building form standards for shopfront buildings in an Urban Neighborhood Context.

While traditional zoning identifies a regulatory black box on a lot for the applicant to fill, form-based codes fill that box with a structure that works in the community context.

Changes to the way a community measures building form can result in all kinds of questions from applicants, along with some creative interpretations of the code. For example, while height restrictions are standard in traditional regulations and usually expressed in feet, in a form-based code building height is used to ensure that all structures in a specific area "fit" together, and may be expressed in stories rather than feet. Where the form-based code does not specify a measurement range for a story, an applicant may decide to extend the height of each story and ultimately the height of the structure, thus undermining the whole concept of "fit."

Finally, **Public Space Standards** regulate streets and public spaces. Creating walkable communities is a core tenet of form-based coding, so the street standards are both pedestrian- and automobile-oriented. These standards include: (1) the design of individual street types (also called thoroughfares, but that's always harder to spell) with travel lanes, bike lanes, parking areas, and sidewalks; (2) the design and connectivity of the overall street system; and (3) required streetscape standards. The active regulation of public spaces may be a new idea in communities with traditional zoning regulations; public space dedication is more typically a function of subdivision design. Explaining the function, size, and design requirements of the various types of public spaces will need to be part of the implementation process.



The form-based code for the Boulder Junction area in Boulder, Colorado, specifies required locations for different types of public space.

Drafting Tips for Form-Based Codes

The best way to head off the angst of change when moving from a conventional code to a form-based code is to take care in the initial drafting of the new code. Code ambiguities resulting from poor drafting are often the subjects of the first code amendments after the initial code adoption. Head off difficulties by addressing the following before adopting the code:

Statutorily Defined Terms. Some state and federal statutes use terms that attach specific meaning to land-use requirements. In these cases, it is very important to use those terms (accurately) and to not invent new ones. For example, state statutes typically use the term "variance" to describe and enable a particular land-use approval that must meet specific statutory standards. In that case, the code should not create a new land-use approval process that does not adopt those same standards while referring to it as a "variance." The same can be true for statutory planning words such as "exceptions" or "consistent." Furthermore, be aware of circumstances where the code language may have been the subject of court interpretation, as that interpretation must be respected if the same language is used.

Plain English. While it is true that form-based codes have developed their own "terms of art," the more that the code uses plain English, the more readable, understandable, and usable the new code will be. The reader should not have to take a secondary language course to understand how the code works. Use short declaratory sentences, avoiding the passive voice. Write like Hemingway, not like Faulkner, when writing a code. Do not use two words when they have the same meaning; as one practitioner has stated: "To add is human, to delete is Divine." Words that are used repeatedly throughout code must retain the same meaning in all contexts. Be very clear about when standards or procedures are mandatory (use the word "shall" or "must"), as opposed to when they are advisory ("are encouraged to" or in many jurisdictions "may"). We counsel clients that advisory language means that the regulation is optional and the applicant can choose to opt out.

Statements of Intent. Statements of Intent, particularly in the introductory provisions of the form-based code, can be very helpful to explain the purpose of the form-based code and what it seeks to achieve. Because the new code will often dramatically change the regulatory framework, form-based codes may usefully contain a fuller description of intent than a conventional code. Once the visioning and educational process of community involvement leading up to code adoption is ended, the statement of intent articulates and carries forward this community vision for the future users of the code. For example, the Miami21 code includes an extensive description of purpose and intent, including "guiding principles" that describe goals for the city, the community (including neighborhoods), and for blocks and building (see miami21.org). The Nashville Downtown Code (DTC) has an extensive introduction section that provides information about both why the code establishes specific regulations and how those regulations will be applied to meet community goals. For example, in support of the goal to "create and nurture urban neighborhoods," the introduction explains:

> To create these distinctive urban neighborhoods, the DTC aligns the regulations of each subdistrict with the intended character of the neighborhood. For instance, the South Gulch is envisioned to continue as a high-rise and midrise, mixed-use neighborhood. The DTC codifies mid-rise height in the general subdistrict and allows high-rise buildings on key intersections and along important streets. In contrast, the North Gulch is envisioned to be a low-rise neighborhood – to preserve Capitol views and transition into the Hope Gardens and John Henry Hale neighborhoods. The DTC codifies this vision by capping the overall height, allowing for less intense development such as two story houses and townhouses, and encouraging porch and stoop frontages.

Definitions. Accurate definitions are critical to the code's usability. All terms of art should be included in definitions. Definitions should not contain regulations or commentary. Regulations should appear in the relevant sections of the code; commentary should appear in statements of purpose or in supplementary, nonregulatory publications such as vision statements or guides.

Graphics. Form-based codes rely heavily, and with great effect, on graphics. Tables, charts, and illustrations often can efficiently communicate standards more understandably than words. The code should be very clear about when graphics are explanatory and illustrative rather than regulatory, and captions for the graphics are very helpful in providing this clarity.

TESTING YOUR FORM-BASED CODE

Prior to adopting the code, and throughout the process of drafting, the various provisions of the code should be put through testing scenarios. Testing will identify where the code is unclear or not effective. It will also highlight those types of reviews that may require additional staff training or community education. Test the code for the types of standard and high-profile development applications that the community expects, or hopes, to be reviewed.

Certainly, the administrative staff that will be responsible for implementing the code should be involved in applying the newly drafted code to various development application scenarios. Planners, zoning technicians, building permit officials, and code enforcement personnel are examples of people who need to understand the code before its adoption, so they can alert the drafters to potential administrative issues. Staff should be asked "what is the worst (and best) result that can be created with this process or standard?" as well as "how can we make it work better?" Testing by the end users of the code—the applicants and their professional consultants—will also alert the drafters of potential glitches in the code. We also suggest that laypersons should be involved in the testing, to learn how usable and understandable the code is to the general community, including residents and home owners who are likely to pay attention to potential future development.

ADMINISTRATIVE PREPARATION

The new regulations will need to be rolled out both internally and externally. There are several ways in which the rollout of the new code can be made more successful for both audiences through advance training of staff and advance preparation of guides and forms.

Internal Administration

The design-centric nature of the form-based code may require additional training for the existing staff, and additional expertise to supplement their skill sets. Administrators across departments may need to learn new concepts and must become familiar with new regulations and tools. Participation in the development and testing of the new code by existing staff—across departments—can identify where the gaps in expertise and experience lie. This early identification and planning for additional or different assistance will prepare the administration for budget impacts as well.

The new code certainly will require new or revised application forms and review and comment sheets. It will be useful to create a review sheet for each project type, identifying relevant code provisions, providing necessary interpretations (or changes to the draft), and flagging issues that may need special attention or items that need other departmental reviews. Charts that compare the old and new provisions can guide the transition for staff and other users. Implementation of the new code may also require new or updated computer software for intake, processing, and records retention. If a local government relies on its website to provide project submission and review information, this is the time they should update that information.

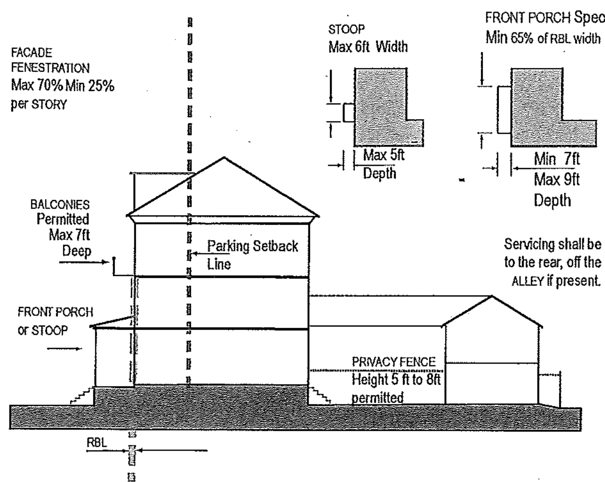
Communities can use the creation of an application form and checklist as an internal education tool to identify places where interpreting and applying the form-based regulations is straightforward and places where more education, better graphics, and perhaps code amendment will be helpful to staff. And where code changes are helpful to improve staff understanding, they are usually also helpful to the development community.

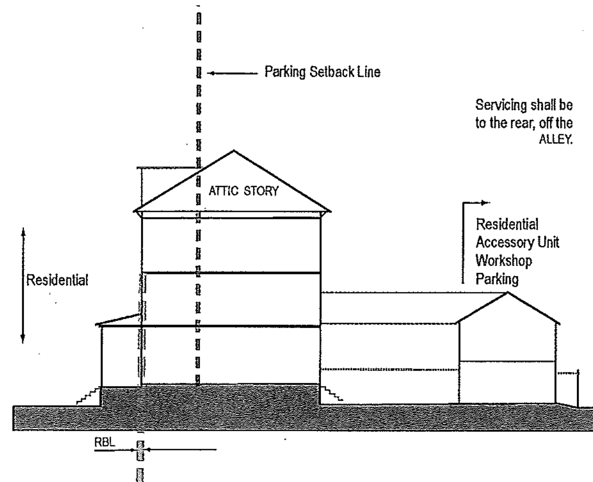
A good application form and checklist go beyond requiring a generic site plan and instead provide guidance about navigating the regulations. Creating a detailed checklist may seem like an unnecessary use of staff time when it is the applicant's responsibility to follow the code. We disagree. A good application checklist directs the applicant to self-help and reduces the number of times that an applicant will call or stop by with questions. This frees staff to help with complex design issues or to work on other projects. The checklist should: (1) identify all of the required contents of the plan, preferably with short descriptions and references to relevant code sections so the applicant can refer back to the code if necessary; (2) distinguish requirements that may not be applicable to all developments (e.g., FAR is not measured on residential sites, or supplemental landscape standards are applicable along specific streets); and (3) provide the applicant with a guide to relevant choices, such as identifying specifically applicable subarea regulations (while also asking the applicant to identify where they have made relevant choices; for example, identifying where the applicant has provided a sufficient amount of affordable housing to opt into a square-footage bonus for a commercial structure).

Some examples of detailed submission checklists include Arlington County, Virginia's Columbia Pike Form Based Code Development Application; Malta, New York's FBC Project Application Checklist; and Colorado Springs, Colorado's FBZ Development Plan Application Requirements.

At this point in the process, it is also prudent to analyze whether the new code would be better implemented with restructured review bodies, or whether board member qualifications need to be changed. Should new board members be appointed? Can those community members active in the development and adoption of the code become board members who help to ensure the success of the code? Putting these changes in place before or concurrent with the new code adoption helps to position the community for better outcomes.

For everyone involved in the implementation of the new code, including the staff, board members, and elected officials, a user's guide to the code will be very helpful. Some communities adopt the code with a narrative supplement to the effect of "how to use this code." This walks the reader, in layperson's language, through the basic process of determining which regulations





Arlington County, Virginia

In 2013, Arlington County, Virginia, adopted the Columbia Pike Neighborhoods Form Based Code to facilitate the preservation of 6,200 affordable housing units.

apply to a project, including the applicable procedures and standards. A more extensive explanation, with illustrations and other helpful aids, can be provided in an administrative manual. In abbreviated form, the code and the changes it incorporates can be explained also in a "frequently asked questions" document available at the planning counter, the community website, or other public areas. Examples of a range of approaches to form-based code user guides are available online. Some approaches to providing users with a guide to the regulations:

- South Padre Island, Texas, Padre Boulevard and Entertainment District: The guide takes applicants on a step-by-step walk through the code to determine applicable regulations, along with illustrations and sample calculations.
- Chapel Hill, North Carolina, Form-Based Code Guide: This guide offers a detailed preadoption community guide to form-based code basics, regional use, anticipated outcomes, and how form-based regulations could work in a specific area.
- Miami, Miami21: The code preamble describes step-by-step instructions for how to navigate the various sections of the code, and the city's webpage provides an abbreviated description (miami21.org/zoning_usingthecode.asp).
- Nashville, Tennessee, Downtown Code: A "how-to" guide is included in the code introduction. It provides basic instructions for using the regulations as well as an overview of procedural options for modifications to standards.
- Boulder, Colorado, Form-Based Code: Instructions for the user are built in to the individual sections of the Boulder Junction Phase 1 Code Area, providing users with both graphics of design elements as well as maps of where specific element types should be included in the site design.

Finally, a critical area of discussion needs to be around the selection of administrative procedures. This will be most relevant for communities that stick to the basic review processes of rezoning and subdivision approval with the random conditional use approval thrown in for variety. Form-based regulations require site plan review and, at a minimum, a method to modify design standards to meet site conditions. This is a different procedure than a variance; and, as we noted above, a variance is a specific procedure with legal requirements that should not be "adjusted" to change the form-based regulations.

Many communities opt for at least two types of design modification: one that allows the administrative approval of changes to measurable regulations up to a specific percent of modification and one that creates a higher level of review—typically discretionary—for either a greater percentage of change or change to a more subjective regulation. For example, an administrative modification may be permitted for a change of 10 percent or less to a parking lot setback where the topography of the lot makes it a better choice to locate a space in the setback rather than perched over a steep grade. In the same code, there may be a provision that allows planning commission or elected official review and approval of a landscape plan that reduces the required private open space on a lot and replaces it with a public art installation. Another subject for form-based-specific procedures is creation of, and amendment to, regulating plans. Old-school form-based codes came with the regulating plan built in, but these days we are also observing more options to create a regulating plan after the fact. As an example, see Cincinnati's Form-Based Code (http://bit.ly/2GpInoc), which includes instructions for creating a regulating plan as part of the code. We would be remiss in our duty as attorneys to not tell you here that much of what is permitted in administrative procedures is regulated by state law, and your jurisdiction's attorney should review proposed procedures prior to adoption.

Neighborhood Outreach

A mantra of form-based codes proponents is "make the good easy." In the form-based codes process, one way this is done is by front-loading the public involvement process. The regulating plan and conceptual design criteria are typically established through an on-site, open-invitation public charrette process. Members of the community are invited to provide feedback about preferred design options through visual preference surveys, design meetings, and workshops organized over a concentrated time frame, and then provide feedback on the draft regulating plan and form standards. Then the governing body adopts the regulating plan and standards. In many communities that adopt form-based codes, this is the end of the public input process. Unless a proposed project is not in compliance with the regulations, the project is approved administratively, without any further notice to the neighbors.

Neighbors, even though they may have participated in the charrettes and code-adoption process, understandably are the group most likely to react in unpleasant ways if they are not notified of new development. While the intention to limit additional input and comment for conforming projects is correct in terms of streamlining project approval, there is no legal requirement that the typically recommended, no-input form-based code procedures be adopted with the new form-based code. And indeed, as projects become more complicated and more code interpretation is required, there are more legal reasons to opt for a higher-level review process.

Fort Worth, Texas, provides an example of how to maintain community involvement in both the FBC creation and application-review process. Fort Worth encourages the hands-on creation of new form-based regulations at the neighborhood level. When an application is submitted that is noncompliant with the specific FBC, the applicant is referred to community partners in the relevant neighborhood to discuss options for revising the application to address both the neighborhood's and developer's design and function requirements.

Your community can decide to proceed in a variety of ways to allow public input in the development approval process. Maybe small or simple projects get administrative approval, but projects with community impact get a standard public hearing. Maybe general commercial development gets administrative approval, but downtown development gets a public hearing. Or maybe any project that includes significant changes to public infrastructure, such as street narrowing, requires a public hearing. The point of public involvement in any of these cases may not be to change the project design, but simply to inform the public of changes that will be taking place and gather input that may ultimately improve the process or the code—and possibly to also avoid a bitter referendum on the form-based code and the elected officials and staff who adopted it.

TALKING ABOUT THE ADOPTED CODE

Post-adoption is the time when the fun changes from "this new code is so exciting and will solve all of our problems" to "wait, this new code won't let me build my postmodern one-story, with a rusted-metal exterior indoor/outdoor building for a cat cafe and vintage roller rink downtown. I'm calling my council member." We need to talk up the code, talk about the code, and keep coming back to the code. At the outset we need to keep everybody moving forward with the code. At some point down the road, we can also start letting them know that the code is working. Dialogue is good; monologue may be necessary.

It can be useful to liken a newly adopted form-based code to a smartphone. Most of us have heard of smartphones; many of us somehow decided that we needed a smartphone. And some of us, upon getting our smartphones, had no idea how to make it do all the things it could do. This is a recurring theme in discussions about form-based codes—not everybody who will be using the code really understands the code. If your community is considering preparing a form-based code, the very first step should be to make sure that people who are not experienced planners, such as elected officials, development professionals, and residents, can get on board with this approach.

And one conversation is most likely not enough. The new code must also be the subject of continuing education for the community and its leaders and administrators. The basic understanding of the code needs to be maintained. The leadership involved in initial adoption and implementation will likely change over time. The materials and programs that explain the code and its operation need to be kept up to date and in the community's awareness.

Raleigh, North Carolina, is an example of a community that has undertaken an ongoing conversation about form-based regulations. Raleigh adopted a new form-centric code in February 2013 with a six-month window for applicants to submit projects under the old code. During that six-month window, Raleigh's city planning staff provided external outreach about the new regulations through three to six in-person presentations per week to design professionals, civic groups, neighborhoods, and anybody else with an interest in how the code would work.

Internally, the city's development services staff did formal training on the new code that still continues, as needed, to the current date.

A structured approach, such as Raleigh's, is key to providing both staff and the design community with a similar understanding of how to use the new regulations.

The adoption of the form-based code ideally brings at least a brief "honeymoon" for the community as it celebrates the promise of better community development and placemaking. Of course, "life happens," and the challenges of implementing the code will continue.

Code implementers can maintain the momentum by looking for and helping to create success stories to share.

One of the reasons that form-based codes have gained popularity is the promise that development results will be better for the public, the process more predictable and less costly for the developer, and that projects will add sustainable economic value to the community. The development community can be an ally in delivering this promise if parties are willing to work together to create a success story. Those success stories need to be shared through various media, including both external and internal media sources. Arlington County, Virginia, keeps track of the projects built in the Columbia Pike form-based code area and shares on the project website details about the number of new residential units

(including affordable units), overall square footage of new commercial space, and a brief list of new public amenities.

AMENDING THE CODE

A zoning code, regardless of the approach, is a living document. Planners should anticipate that the code will need to be amended, to fix "glitches," to adapt to changes in the planning and development environment, or simply to resolve policy conflicts. Planners should embrace needed changes and address any difficulties head-on. What can the development community teach you about how the code is working or not working? What feedback is the public and the administrators of the code providing? The first several years of implementation may demonstrate that definitions or rules of measurement need adjusting, or the internal inconsistencies need to be resolved.

Later, more complex issues resulting from experience with development proposals may become apparent, or larger policy changes may point to the need for new zoning districts or standards.

Greater experience with the code may also lead to recognition of a need for administrative or staffing changes. If open communication between all the stakeholders can be nurtured, and an attitude of problem solving be maintained, the necessary changes can improve the effectiveness of the form-based code.

Denver's form-oriented code has been in place long enough for staff to have recognized at least two distinct trends in amendments. During the first four or five years, many of the amendments related to clarifications, rules of measurement and definitions, and internal inconsistencies. After working to clarify and revise those aspects of the regulations, the second era of amendments started to address issues that come with experience with the code. These amendments have included consideration of the creation of new districts, new approaches to existing form regulations, refinement to regulations to address unanticipated outcomes, and balancing flexibility and clarity.

To organize the amendment requests and determine what to consider and what to abandon, Denver holds a weekly technical team meeting to review change requests. The requests are grouped into four categories: clerical error, clarification, minor policy or rule changes, and major policy or rule changes. The first three categories are bundled into annual amendments. The fourth category of changes are considered individually, fully vetted by staff, and may need case studies in support of the requested change.

One recent area of change was in the regulation of slot homes or sideways-facing town homes. Residents felt that the layout of this housing form was detracting from neighborhood design, and city staff identified slot homes as noncompliant with neighborhood design objectives. The city undertook a detailed review process that resulted in zoning changes.

GOOD CHANGE REQUIRES WORK

The continuum of form-based code adoption and application can be both challenging and rewarding. Our goal with this article is to ensure that communities understand that the work doesn't end with adoption. Anecdotally, we have heard of communities where the new form-based code is abandoned as unworkable or amended so as to lose its design effectiveness.

We wonder whether those codes lost momentum after adoption because there was still more work to be done. As we see the continued success of form-based regulation where the codes have been in place long term, we want to encourage communities with new codes to take these important steps toward structured implementation and acceptance of the form-based code.

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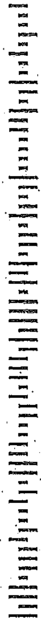

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IS YOUR COMMUNITY READY TO ADMINISTER A FORM-BASED CODE?

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