

**THROUGH THE LOOKING GLASS: ANALYZING THE
POTENTIAL LEGAL CHALLENGES TO
FORM-BASED CODES**

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I. INTRODUCTION: DOWN THE RABBIT HOLE

Alice was beginning to get very tired of sitting by her

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sister on the bank, and of having nothing to do: once or twice she had peeped into the book her sister was reading, but it had no pictures or conversations in it, “and what is the use of a book,” thought Alice, “without pictures or conversations?”¹

Consider the last time you thumbed through a city’s zoning ordinance. Even those who write and interpret zoning ordinances for a living know these documents pale in comparison to the magic created in Carroll’s tale. Over time, efforts have been made to make these documents more accessible to the public by including tables and maps printed in bright colors. However, even the most highly trained planner, urban designer, or developer often struggles to ascribe meaning to the principles embedded in these codes (let alone use them to propose new, more beautiful forms of development). Members of the Congress on New Urbanism have sought to overcome the limitations associated with traditional zoning and subdivision regulations by introducing the form-based code. A form-based code is “a regulatory approach designed to shape the physical form of development while setting only broad parameters for use.”² Unlike conventional or Euclidean zoning (which begin with a determination of land use and then rely on that use for the remainder of the regulatory process), “form-based codes regulate development by building type, street type, location (character area), transect or ecozone.”³

This Article seeks to contextualize the form-based code in planning history as a reaction to city planning efforts that have continuously stressed function over urban design. Further, the authors seek to describe the language of form-based codes and how this new tool might be used instead of traditional ordinances or alongside them. While the concept is too new to fully evaluate in terms of success, the authors seek to shed light on the potential legal challenges that may result from the introduction of form-based codes in cities where zoning laws have long dictated development processes.

1. LEWIS CARROLL, *ALICE’S ADVENTURES IN WONDERLAND* 1 (D. Appleton & Co. 1927) (1865).

2. Jerry Weitz, *Form-Based Codes: A Supportive but Critical Perspective*, 3 *PRACTICING PLANNER* (2005), <http://www.planning.org/practicingplanner/print/05fall/practitionersbookshelf.htm> (citation omitted).

3. *See id.* (citation omitted).

II. FROM ONE REACTION TO ANOTHER: FORM, FUNCTION, FORM,
FUNCTION . . .

In his classic book, *Cities of Tomorrow*, Peter Hall explores the evolution of the ideas central to modern city planning practice.⁴ Hall begins his discourse with the state of cities during the Industrial Revolution—a period in history when unprecedented enterprise dictated urban form and a time when urban design had little relevance. Hall deems this period of urban development “The City of the Dreadful Night,” citing deplorable living conditions beyond modern imagination.⁵ Hall turns to John Ruskin to describe this period:

[T]he great cities of the earth . . . have become . . . loathsome centres of fornication and covetousness—the smoke of their sin going up into the face of heaven like the furnace of Sodom; and the pollution of it rotting and raging the bones and the souls of the peasant people round them, as if they were each a volcano whose ashes broke out in blains upon man and upon beast.⁶

Reacting to such conditions, early pioneers of urban design suggested that regulation was necessary to ensure that the quest for further industrialization would not have such devastating effects on the built and natural environment. Zoning practices soon followed with the enactment of building codes and New York City’s first ordinance in 1916.⁷ When first introduced in the United States, the primary goal of zoning was to separate noxious uses—such as slaughterhouses, tanneries, and other nuisances—from residential or commercial areas. And, while zoning has evolved over time to cover a wide range of development issues (such as controls on height, lot size, building frontage, setback, lot coverage, and even floor-area ratio (FAR)), it has never strayed from its core function of separating different uses. Until recently, this typically resulted in local zoning regulations that specified separate residential, commercial, and industrial districts.

As zoning evolved, so did its partner process—subdivision. At

4. See PETER HALL, *CITIES OF TOMORROW* (updated ed. 1996).

5. See *id.* at 14-46.

6. *Id.* at 13 (ellipses in original) (quoting JOHN RUSKIN, *LETTERS TO THE CLERGY ON THE LORD’S PRAYER AND THE CHURCH* (1880)).

7. See *About NYC Zoning*, New York City: Department of City Planning, <http://www.nyc.gov/html/dcp/html/zone/zonehis.shtml>.

first, the purpose of a subdivision was simply to provide an efficient method to identify land for sale. Over time, however, and especially in the post-war period, subdivision has evolved into a tool for community planning. Eventually, communities became more aware of the overall impact of large subdivision developments and incorporated requirements into regulations specifying street design, infrastructure requirements (such as sewer and water), open space, and other site dedication. While these changes allowed communities to impose greater specificity for requirements than ever before in the look and functioning of subdivisions, they also started the process of limiting overall design options.

American zoning and subdivision practices, while effective for ensuring the separation of incompatible land uses, have been widely criticized. The bases for these criticisms vary. For example, some critics charge that zoning practices have created non-unique, sprawling cities. According to the neotraditionalists, the worst aspect of the continual use of unsound urban patterns is “the rigid manner in which planning regulates urbanist ideals in its implementation devices—the separation and spatial scattering of urban land uses that is endemic to the vast majority of zoning ordinances and subdivision regulations imposed in the United States.”⁸ One thing is true: traditional zoning practices continue to be devoid of details that would promote the notion that beauty in the built environment “would reflect in the souls of the city’s inhabitants, inducing order, calm, and propriety therein.”⁹

This is not to suggest that historical movements have not been made in order to bring beauty to our cities. Daniel Burnham, perhaps the greatest proponent of the City Beautiful movement, sought to bring together the order of zoning with the beauty of architecture.¹⁰ The City Beautiful movement did not last, however. While a number of edifices from this period remain, the preference for functionalism over beauty has remained a foundational element of American city planning over the last century.

The history of urban planning has long been reactionary in nature, and proponents of urban design continuously challenge the ordinances they contend result in the overly zoned city. The New Urbanists receive significant attention for their push to return to traditional neighborhood development patterns, as demonstrated

8. Andres Duany & Emily Talen, *Making the Good Easy: The Smart Code Alternative*, 29 *FORDHAM URB. L. J.* 1445, 1449 (2002).

9. WILLIAM H. WILSON, *THE CITY BEAUTIFUL MOVEMENT* 92 (1989); *see also* WILLIAM FULTON, *THE NEW URBANISM: HOPE OR HYPE FOR AMERICAN COMMUNITIES* 7-10 (1996).

10. *See, e.g.*, Daniel Burnham, *Chicago Landmarks*, <http://www.cityofchicago.org/Landmarks/Architects/Burnham.html>.

in the developments of Seaside and Celebration in Florida and the Kentlands in Gaithersburg, Maryland.

The traditional neighborhood development, revitalized by the current neotraditionalist movement,¹¹ is both a reaction to, and a departure from, the roots and current realities of conventional zoning and subdivision. Neotraditional developers seek to reintroduce a development layout that is reminiscent of traditional cities and residential districts, where pedestrian activity is maximized through mixed uses in a compact space and automobile use is consequently minimized.¹² In terms of regulations, this means:

1. Allowing a variety of uses in order to create vitality and bring many activities of daily living within walking distance of homes;
2. Fostering mixed residential density and housing types;
3. Stimulating infill and rehabilitation activity;
4. Developing contextual design standards that ensure new development responds to the typical architecture style of the city or region;
5. Creating compact, walkable centers and neighborhoods served by public transit;
6. Enhancing streetscape and civic life; and
7. Shaping metropolitan regions with public space, farmland, and natural areas.¹³

Some conventional zoning and subdivision regulations meet some or all of these goals, but many do not. Exasperated by the barriers conventional zoning and subdivision create, neotraditionalists advocate for local governments to “[j]ust throw your existing zoning in the garbage”¹⁴ and start anew.

11. For an excellent review of New Urbanism, see Robert Sitkowski, Address at the International Municipal Lawyers Association: The New Urbanism for Municipal Lawyers (April 12, 1999) (on file with author) available by subscription at <http://www.imla.org/members/mlpaperindex/papers/s99sitkowski.htm>.

12. CONGRESS FOR THE NEW URBANISM, AM. PLANNING ASS'N PLANNING ADVISORY SERVICE REPORT NO. 526, CODIFYING NEW URBANISM: HOW TO REFORM MUNICIPAL LAND DEVELOPMENT REGULATIONS 12-15 (2004) [hereinafter CODIFYING NEW URBANISM].

13. *Id.* at 15-23.

14. Peter Katz, *Form First: The New Urbanist Alternative to Conventional Zoning*, Nov. 2004, <http://www.formbasedcodes.org/downloads/FormFirst.pdf>.

III. THE LANGUAGE OF FORM-BASED CODES

A. New Jargon

When dealing with regulations like form-based codes that have their roots in neotraditionalism, it is necessary to learn a new language to describe familiar phenomena. The language of neotraditional development is a jargoned mix of architecture and planning terminology that intentionally does not follow current land use nomenclature. The language especially does not follow the naming used in any legal system. This lack of compliance with previous systems occurs because many of the original neotraditional projects were designed as subdivisions, and all of the New Urbanist issues (building placement, architectural style, location, and maintenance of open space) were handled through private covenants and deed restrictions. Those covenants and deed restrictions were labeled or relabeled with titles that either do not align with practitioners' expectations of a document given a particular title or do not reflect the hybrid legal nature of the document. Examples of relabeling or new titles include Regulating Plan (community-reviewed site plan) and TND Code (private covenants). These titles, given to documents between private parties, have caused confusion and reclassification as they move into the public sector:

There is, however, confusion among many practitioners about the term "code" as used by Duany Plater-Zyberk & Company. This confusion stems from what appears to be a fundamental misunderstanding of the distinction between private covenants and public law. Professor Jerold Kayden, in moderating a panel at a recent conference held at the Harvard Design School, attempted to unravel much of this confusion, to no avail. Professor Kayden did, however, set the stage for Mr. Duany to articulate some definitions in his highly advanced model of what he terms "regulatory codes." These "codes" are, in reality, designed to be private covenants. Mr. Duany took the opportunity to explain his understanding of the difference between a "code" and an "ordinance," stating that the former implements the master plan and is not binding except by agreement. Ordinances, on the other hand, are codes that have been

“subjected to democracy.”¹⁵

B. Different Approval Processes

In addition to using a new language and terminology, neotraditional development frequently blurs the lines of traditional approval processes. When thinking about creating or applying a regulatory process for a neotraditional project, municipal attorneys and planners can start by setting aside traditional regulatory classifications:

Implementation of New Urbanism does not observe conventional distinctions between zoning, subdivision regulation, private deed covenant and restrictions, public and private design regulation, street design and improvement, and the layout, design, construction, and maintenance of a wide range of public improvements, including sidewalks, open spaces, plantings, utilities, transit systems, and public buildings.¹⁶

In reality, neotraditionalists are not as far away from conventional regulatory processes as they assert. Most communities have and use planned unit development ordinances, which provide a model for considering neotraditional development. It is helpful to explore the contents of a form-based ordinance and then return to the similarities with a planned unit development.

C. The Contents of a Form-Based Code

The goal of form-based codes is to be “prescriptive” rather than “proscriptive.” This concept is woven through the regulatory approach. Put simply, “[t]he setback line [conventional] is proscriptive, specifying prohibitions. The build-to line [neotraditional] is prescriptive, *prescribing* what is expected.”¹⁷ Form-based codes are packed with specific instructions, details, and unique graphics and illustrations, the majority of which are geared toward the design of physical space. This is intended to rectify the problems with current regulations: “[t]he many words in conventional zoning

15. Sitkowski, *supra* note 11, at 5-6.

16. CODIFYING NEW URBANISM, *supra* note 12, at 31.

17. VICTOR DOVER, ALTERNATIVE METHODS OF LAND DEVELOPMENT REGULATION (1996), available at www.spikowski.com/victor_dover.htm (report prepared for the city of Fort Myers Beach, Fla.).

codes are often incomprehensible to all but the legal experts; drawings can communicate much more clearly what is permitted under or sought by the code.”¹⁸ Overall, “the level of physical detail in a form-based code exceeds that of a conventional land-use plan,”¹⁹ which has a directly related drawback in that a form-based code can be ‘prohibitively expensive’ to prepare for an entire community.²⁰ The advantage to this approach is that form-based codes are easy to understand and may be easier to use than conventional regulations.²¹

A conventional zoning ordinance is typically focused around chapters that describe districts (with uses listed), bulk regulations, supplemental standards, and definitions. The districts and use list (either laundry or matrix) is the heart of the regulations. While drafters and commentators vary on the number of mandatory elements to include in a form-based code, the generally recognized components are: (1) regulating plan, (2) building envelope standards, (3) definitions, and (4) architectural design standards.²² Additionally, most form-based code drafters agree that a regulating plan is the heart of the process, with other elements included as needed by each community.²³

1. *Regulating Plan*

A regulating plan is comparable to an area plan or a specific plan, falling more in the planning category than the regulatory category. A regulating plan has characteristics similar to a very detailed development plan and/or preliminary plat. The only difference is that creation of the regulating plan usually precedes development, whereas the development or plat is part of the approval process. Preparing a regulating plan usually involves a public process that starts with the identification of an overall vision for the area being planned and moves through a series of refinements until it reaches the level of plan detail required by the community. In addition to the regulating plan images, there are specific rules for the design of blocks and alleys, a hierarchy of building envelope standards, streetscape requirements, parking requirements, and instructions for the distribution of retail uses. These rules are drafted in a similar manner and with similar language to conven-

18. *Id.*

19. Philip Langdon, *The Not-So-Secret Code*, PLANNING, Jan. 2006, at 28.

20. *Id.* (internal quotation marks omitted).

21. *Id.*

22. See Robert J. Sitkowski & Brian W. Ohm, *Form-Based Land Development Regulations*, 38 URB. LAW. 163, 164-65 (2006).

23. *Id.*

tional regulations.

The Columbia Pike Special Revitalization District Form-Based Code provides an example of a regulating plan.²⁴ After Columbia Pike—once considered the “Main Street” of South Arlington, Virginia—began experiencing disinvestment and blight, the city and community undertook a neotraditional planning process. As part of this process, in 2003, the city created and adopted a form-based code. The Regulating Plan for the Columbia Pike code provides images of the various streets within the redevelopment area and identifies appropriate building and parking requirements along those streets.²⁵

2. *Building Envelope Standards (BES)*

The building envelope standards section follows the regulating plan. Moving from a large picture of the overall area to a smaller picture of a specific site, the building envelope standards provide the regulatory requirements for the building itself. Because form-based codes are not formatted around the distribution of uses, the building envelope standards provide the everyday nuts and bolts of the regulatory process. Building envelope standards typically include a diagram and matrix of instructions that illustrate the development of a building on a site, including requirements for height, location on the site, building elements (for example, windows, doors, and porches), and uses.²⁶ A form-based code provides a use list; however, design decisions are more important than use determinations. A developer seeking development approval would need to show site compliance with the building envelope standards as the starting point of any review.

Many of the standards contained in the building envelope standards would also be included in conventional regulations, but the standards take on much greater importance in form-based codes. For example, height restrictions may be a static or even throw-away regulation (or completely missing in some instances), in conventional regulations. In a form-based code, however, build-

24. Arlington, Virginia—Columbia Pike Form Based Codes, <http://www.arlingtonva.us/Departments/CPHD/forums/columbia/current/CPHDForumsColumbiaCurrentCurrentStatus.aspx> (last visited Apr. 13, 2008).

25. Arlington, Virginia—Columbia Pike Form Based Codes, http://www.arlingtonva.us/Departments/CPHD/forums/columbia/current/pdf/fbc_streetscape_0205.pdf (last visited Apr. 13, 2008).

26. Jason T. Burdette, *Form-Based Codes: A Cure for the Cancer Called Euclidean Zoning?* 40-42 (Apr. 19, 2004) (unpublished Master's major paper, Virginia Polytechnic Institute and State University), *available at* <http://scholar.lib.vt.edu/theses/available/etd-05122004-113700/unrestricted/BurdetteFINALmajorpaper.pdf>.

ing height is a considerable standard. “A maximum number of floors . . . is set to ensure that a building does not overwhelm its neighbors. Unlike use-based zoning, form-based codes also specify a minimum height in order to maintain a proper street wall.”²⁷ A similar change is made in building or setback lines. Form-based codes guide the exact location of the structure on the site, while conventional regulations delineate those areas where the structure cannot be located. This could mean the difference between homes that line a residential street and homes that are located in a variety of places on the lot.

In contrast to conventional regulations, form-based codes require an examination of use down the road, after the building particulars have been considered. This stands in stark contrast to conventional regulations, where the proposed use determines the requested zone district (and sometimes whether or not that district is consistent with its surroundings) that serves as the basis for the entire approval process. Uses in form-based codes can be distributed both horizontally and vertically. Further, each use may include specific qualifiers. For example, the Atlanta Regional Commission provides the following qualifier for permitted building and lot types:

[S]torefront/mixed use up to 6,000 SF of first floor area; this may be increased up to 65,000 SF of first floor area within 2000 feet of a transit stop, freeway interchange, or the intersection of two major thoroughfares. (To be classified as mixed-use, a building must have at least two occupiable stories, and at least 50% of the habitable area of the building shall be in residential use. The remainder shall be in commercial use).²⁸

3. Definitions

Given the effort of neotraditionalists to distance form-based codes from conventional regulations, the definition section can be very important to a community making the switch from conventional zoning to form-based. As one commentator noted: “[i]tems included in the definitions section are used in very specific ways,

27. Katz, *supra* note 14.

28. TRADITIONAL NEIGHBORHOOD DEVELOPMENT (TND) MODEL ORDINANCE AND DESIGN STANDARDS 3, http://www.dca.state.ga.us/intra_nonpub/Toolkit/ModelOrdinances/TND_ModOrd.pdf (last visited Mar. 8, 2008).

and may differ from common usage interpretations.”²⁹ In addition to site and building layout terminology, there may also be architectural design terminology. Some sample design definitions are provided below:

- Connectivity ratio - the number of street links divided by the number of nodes or ends of the links.
- Link - that portion of a street that is defined by a node (i.e. intersection) at each end or at one end.
- Node - refers to an intersection with another link or the terminus of a link.³⁰

Legally speaking, the definitions section may be the essential part of the adopted regulations. If there are deviations from common interpretation of an ordinance term, it becomes critical to the long-term health of the ordinance that the specific definition be provided. The study of law teaches that if undefined terminology ends up in court, it may be Merriam Webster who supplies the final definition.³¹ It is also critical that the many constituencies of a specific regulation all understand and have a common view of the terminology. Many conventional ordinances are faulted for being overly legalistic in their writing style. Form-based codes attempt to change this language but do not necessarily move to plain English. Instead, the reader must wade through architectural and planning terminology, which does not always carry the same meaning to an engineer, developer, attorney, or judge. It is in the definition section, therefore, where the architectural and planning terminology merges with the legal mindset.

While the definition list need not be lengthy, it must include all design items that could be subject to multiple interpretations. For the city of Austin, Texas, this meant a definitional section in the Traditional Neighborhood District³² that included descriptions of the various “green” concepts such as the following:

(5) GREEN means an open space available for unstructured recreation, its landscaping consisting of

29. Burdette, *supra* note 26, at 42.

30. Prince William County, Virginia, Comprehensive Plan: Town Center and Neotraditional Design, § 1101.03, available at <http://www.pwcgov.org/docLibrary/PDF/004752.pdf>.

31. See, e.g., *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 874 (1999) (determining the plain meaning of the word “coal” by consulting a dictionary); *United States v. Sherburne*, 249 F.3d 1121, 1126 (9th Cir. 2001) (stating that resorting to a dictionary definition is permissible to determine the plain meaning of a term).

32. AUSTIN, TEX., CITY CODE, § 25-3-4 (2007).

grassy areas and trees.

(6) GREENBELT means a series of connected open spaces that may follow natural features such as ravines, creeks, or streams.

...

(9) OPEN SPACE includes squares, plazas, greens, preserves, parks, and greenbelts.

(10) PARK means an open space, available for recreation, its landscape consisting of paved paths and trails, some open lawn, trees, open shelters, or recreational facilities.³³

That is not to assert, however, that form-based codes do not also carry some of the same drawbacks as their conventional counterparts, (or that the drafters do not sometimes share the same bad habits).

4. *Architectural Design Standards*

Architectural design standards took hold in many communities long before the neotraditional movement and have a growing body of case law tracking their successes and failures. Interestingly, in light of this fact, some communities and form-based code drafters avoid including design standards—presumably because they are wary of litigation. This perception arises because “architectural standards also prove to be very subjective.”³⁴ There now appears to be some debate over the necessity of architectural design standards. The authors of *Codifying New Urbanism* provide a “some regulation is necessary” rationale:

While architectural style need not be prescribed, the Charter [of New Urbanism] principles assert “architecture and landscape design should grow from local climate, topography, history, and building practice,” thus avoiding the monotony of conventional suburban development and creating places of character and distinction. Regulations should be responsive to context at two levels: site-specific and regional.³⁵

With a slightly different spin, another leading New Urbanist prac-

33. *Id.*

34. Burdette, *supra* note 26, at 43.

35. CODIFYING NEW URBANISM, *supra* note 12, at 20.

itioner finds that this is really a more locally-determined issue: “some communities—master-planned developments, special retail districts, historic districts, among others—may want to exercise a higher level of control over the appearance of individual buildings.”³⁶

Architectural design standards are regulations that provide specific information about the architectural look of a building. They can range in specificity from general (for example, building materials should be earth-tone in color) to extremely particular (for example, buildings located along Main Street shall incorporate materials that range in color from Pantone 134 to 156 or directly match the existing color of a historic structure located within 100 feet of the building subject to these regulations). Specific design standards may be used to regulate building materials, styles, and details along with building elements such as walls, windows, and roofs, among other design elements.³⁷ Design standards can also include information about landscaping and streetscape. From a legal perspective, these standards may be abused as they may not be consistent amongst all applicants since they are negotiated between the planning staff (or design review committee) and an applicant for development approval.

Typically, once new conventional regulations are drafted, they are adopted and put into use. However, with form-based codes, there is a great deal of uncertainty about abandoning conventional zoning which has been used for decades. Both legal and procedural questions arise, neither of which have clear cut answers this early in the process. A recent article on form-based codes notes as a caveat: “All this is not to say that a form-based code solves every problem—or that conventional zoning, with its regulation of uses, is rendered unnecessary by well-shaped buildings and streets. Even in the areas regulated by a form-based code, the local government typically exerts some control over uses.”³⁸ For these reasons, communities are taking a variety of approaches to putting their form-based codes to work.

5. The Minimal Approach—Working With Existing Regulations

At the most minimalistic end of the spectrum, some communities use existing regulations to review and adopt neotraditional development. This typically takes the form of either planned unit

36. Katz, *supra* note 14, at 2.

37. Sitkowski & Ohm, *supra* note 22, at 165.

38. Langdon, *supra* note 19, at 29.

development (PUD) approval, the creative combination of a number of existing districts, or a series of variances. This approach is condemned by the neotraditionalist community. However, Professor Daniel Mandelker, a noted land use scholar and significant contributor to the APA Growing Smart process, remarks that “TND is not the antithesis of the PUD but is the next generation of it.”³⁹ But even with a PUD on the books, not all communities will be able to review and approve neotraditional development.

The assorted types of planned unit development regulations can be loosely grouped into two categories. The first category is PUD regulations that work like a master-variance process. In these regulations, the property is usually assigned a “base” district from the regular zoning districts, and the applicant is permitted specific modifications of the regulations. For example, an applicant may be allowed to reduce standard setbacks by up to 70%, reduce standard lot size by 20%, or increase overall density by 15%. The result of this PUD approach tends to be more clustered (and clearly tied to a cluster zoning concept) and sometimes more dense than would otherwise be allowed, but overall the development pattern is similar to the development allowed under the standard zoning district.

The second category of PUD regulation is approved through a standard-based approach. Here, applicants submit a site plan that is measured against a series of standards established in the regulations. The standards can range from general—“[t]he plan is consistent with good land planning and site engineering design principles, particularly with respect to safety”⁴⁰—to specific—“[t]he design of the PUD is as consistent as practical with the preservation of natural features of the site such as flood plains, wooded areas, steep slopes, natural drainage ways, or other areas of sensitive or valuable environmental character.”⁴¹ In contrast to master-variance PUD regulations, standard-based regulations tend to result in a more negotiated and less uniform development pattern.

Master-variance PUD provisions are different from standards-based PUD regulation as they relate to neotraditional development. Communities with master-variance PUD provisions will probably have a difficult time reviewing and approving neotraditional development through that process. Typically, there is not sufficient flexibility to address the various development compo-

39. Sitkowski, *supra* note 11, at 7.

40. UNIFIED GOVERNMENT OF KANSAS CITY, KANSAS, 27-276 REZONING: PLANNED DISTRICT, <http://www.wycokck.org/assets/F3917192-91FA-4E43-8EE5-9ACC9E049975.pdf>.

41. City of Warrenville, Business Development: Planned Unit Development, http://www.warrenville.il.us/b_bus-dev_pud.aspx (last visited Mar. 9, 2008).

nents of a neotraditional project. For communities with standards-based PUD regulations, the question is not whether the process is too limited, but whether the standards in place are sufficient to guide development in the key areas of site layout, building placement and dimension, and architectural design. Indeed, it is likely that something called traditional neighborhood development can be approved through the PUD process, but there is some question about whether it is the real thing. The key connection for neotraditional regulation is between the site-specific plan and the regulatory process. Requiring the creation of an area plan or specific plan in addition to the PUD approval may help provide a more detailed picture of appropriate development types and patterns. If this can be combined with design guidelines, it may be possible to provide sufficient guidance for neotraditional development in a standards-based PUD regulation.

6. Amending the Existing Regulations

When is a more substantial amendment to the existing regulations required? If local regulations are a partial or complete barrier to neotraditional planning goals and policies, it may be time to amend the regulations. Piece-meal project approval is stressful for staff and local officials, is expensive for developers, and may expose the community to legal liability. The goal, as neotraditionalists expound, is to make the good easy. Land use regulations should provide a clear path to approval of development that the community wants to encourage.

If an amendment to the existing conventional regulations proves necessary to act more affirmatively in moving to form-based codes, some communities adopt a “phased implementation” approach. The form-based code is adopted and made applicable to “those areas where there is the greatest threat of poor quality development and/or the greatest opportunity for new urbanism to succeed.”⁴² Other communities chose “strategic regulatory intervention,” where existing conventional regulations are revised to incorporate neotraditional provisions. This might include “altering use provisions, dimensional regulations, and supplementary regulations.”⁴³ Sufficiently extensive regulatory intervention may lead to hybrid regulations that permit a community to function under a form-based code with a conventional zoning base or format in

42. Joel Russell, *City of Palo Alto Zoning Ordinance Update: New Urbanism Discussion Paper* (2002), (unpublished paper, on file with the city of Palo Alto, CA).

43. CODIFYING NEW URBANISM, *supra* note 12, at 33.

place.⁴⁴ Other communities adopt form-based codes as “parallel” codes, providing an optional regulatory approach that may include incentives including expedited approvals and permits for development if chosen.⁴⁵ Finally, a limited number of communities replace conventional zoning and subdivision regulations in their entirety with form-based codes.⁴⁶

IV. FORM-BASED CODES: POTENTIAL LEGAL IMPLICATIONS

Unlike its oft-litigated predecessor, conventional zoning, there is very little case law addressing the many regulatory aspects of form-based codes. Yet, from the vast source of case law on zoning, it is possible to anticipate the types of legal issues which may generate challenges to the ways in which form-based codes are currently written.

A. Authority

With a few limited exceptions, authority to adopt form-based codes may actually be the first non-issue that arises. The 1926 Standard State Zoning Enabling Act (SSZEA)⁴⁷, the current basis for many existing zoning regulations around the country, does not rule-out a form-based approach in favor of a use-based approach.⁴⁸ SSZEA provides the following “Grant of Power” provisions:

- height, number of stories, and size;
- lot coverage;
- yards, courts, and other open spaces;
- density; and
- location and use of structures and land.⁴⁹

This grant closely reflects many of the key regulatory tenets of form-based codes. Some states, attempting to eliminate this issue,

44. *Id.* Examples include San Antonio, Texas and Milwaukee, Wisconsin. *Id.*

45. *Id.* Examples include Austin, Texas; Columbus, Ohio; and Dade County, Florida. *Id.*

46. *Id.* Examples include Cornelius, Davidson, and Huntersville, North Carolina. *Id.* “This approach can be the most costly and time-consuming, but it is also the most thorough and effective way to accomplish New Urbanism.” *Id.*

47. ADVISORY COMM. ON ZONING, U.S. DEP’T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (1926).

48. Sitkowski & Ohm, *supra* note 22, at 167; *see also* David W. Owens, *Local Government Authority to Implement Smart Growth Programs: Dillon’s Rule, Legislative Reform, and the Current State of Affairs in North Carolina*, 35 WAKE FOREST L. REV. 671 (2000).

49. Sitkowski & Ohm, *supra* note 22, at 166 (citing ADVISORY COMM. ON ZONING, *supra* note 47).

have explicitly authorized the adoption of form-based codes. These states include California, Pennsylvania, Wisconsin, and Connecticut,⁵⁰ but activity in over three dozen states indicates that change—at least in terms of authority—is on the way.⁵¹ Where this will lead is yet to be seen, but it is fair to guess that

the amount of executive and legislative interest in the topic of land use reform at the dawn of a new century is an indication that reliance on the planning and zoning enabling acts modeled on 1920s model legislation from the U.S. Department of Commerce will not survive in the new century.⁵²

B. Aesthetic Controls—Substantive and Procedural Due Process

1. Substantive Due Process

Design guidelines can prove to be a legal minefield and, as noted above, some communities seeking to adopt form-based codes shy away from architectural design guidelines. Guidelines are a combination of law and design administered by committees and applied to a property owner seeking development approval. The number of imaginable problems with this scenario is measurable and is exacerbated by the potential for litigation, similar to zoning. “Both began in a climate of hostile or at least skeptical legal opinion; both enjoyed rapid growth before constitutional problems were solved; and the form and content of each have been affected by drafting timidity dictated by unresolved legal questions.”⁵³

As with many zoning cases, the typical cause of action to challenge aesthetic regulations is substantive due process. At the outset, aesthetic regulations enjoy all of the presumptions afforded to zoning in general, including: (1) the regulation has a presumption of validity, with the burden of proof on the challenging party; (2) the “regulation will be upheld if its validity is reasonably debatable;” and (3) the “regulation will withstand judicial scrutiny, unless it is clearly arbitrary and capricious.”⁵⁴ This “confirm[s] a

50. See Robert Sitkowski, Anna Breinich & Brian Ohm, *Enabling Legislation for Traditional Neighborhood Development Regulations*, 53 LAND USE L. & ZONING DIG., Oct. 2001.

51. See generally, Patricia E. Salkin, *The Smart Growth Agenda: A Snapshot of State Activity at the Turn of the Century*, 21 ST. LOUIS U. PUB. L. REV. 271, 271 (2002).

52. *Id.* at 272 (footnote omitted).

53. 2 ANDERSON'S AMERICAN LAW OF ZONING § 9.76, at 359-60 (Kenneth W. Young ed., 4th ed. 1996) (footnotes omitted).

54. Jeffrey W. Strouse, Note, *Redefining Trademark Alteration Within the Context of*

judicial posture favoring the validity of zoning laws.”⁵⁵

With this in mind, the substantive due process test⁵⁶ has a well-recognized two-step analysis: (1) “whether the regulation advances a legitimate governmental interest;” and (2) whether “the regulation is a reasonable means to achieve that goal.”⁵⁷ If the state follows the modern rule for aesthetic regulations,⁵⁸ the first prong is met and the analysis focuses on the reasonableness of the regulation—“the due process test for validity is no longer whether a regulation is based primarily or exclusively on aesthetics but whether the regulation itself is reasonable.”⁵⁹

Due process challenges can be brought either facially or as applied. Facial claims can be premised on the failure of the regulation to further its stated purpose⁶⁰ or where a void-for-vagueness claim is presented.⁶¹ As applied, the challenge is premised upon the arbitrary and capricious application of the regulation to the use of the property.⁶² In some jurisdictions, reasonableness is determined by a balancing of interests, weighing private loss against the public benefit of regulation.⁶³

Because some of the terms incorporated into aesthetic controls

Aesthetic-Based Zoning Laws: A Blockbuster Dilemma, 53 VAND. L. REV. 717, 726-27 (2000).

55. *Id.* at 726.

56. See Annette B. Kolis, Note, *Architectural Expression: Police Power and the First Amendment*, 16 URB. L. ANN. 273, 284 n.41 (1979) (“Procedural due process claims are . . . unsuccessful because adequate procedures in the review of architectural design are generally provided by municipalities.”).

57. Mark R. Rielly, *Neo-Traditional Neighborhood Development: Community by Design*, 24 ZONING & PLAN. L. REP. 57, 60 (2001); see also 29 AM. JUR. 3D. *Proof of Facts* § 491, at § 11 (1995) (“Challenges to the reasonableness of the regulation require evidence that the restriction is not reasonably related to a legitimate governmental purpose, i.e., that the regulation is arbitrary and capricious.”).

58. This means allowing aesthetics as the sole basis for regulations without requiring some other basis such as preservation of property values. See Elizabeth A. Garvin & Glen S. LeRoy, *Design Guidelines: The Law of Aesthetic Controls*, 55 LAND USE L. & ZONING DIG. 3, 5 (2003).

59. 2 EDWARD H. ZIEGLER, JR., ET AL., RATHKOPF’S LAW OF ZONING AND PLANNING § 16:5 (4th ed. 2001).

60. See, e.g., *Rhodes v. Gwinnett County*, 577 F. Supp. 30 (N.D. Ga. 1982) (enjoining enforcement of a county ordinance that allowed only one business sign on business premises); *City of Nichols Hills v. Richardson*, 939 P.2d 17, 19 (Okla. Crim. App. 1997) (stating that “we find this ordinance, on its face, does not promote aesthetics as alleged”).

61. See *City of West Palm Beach v. State*, 30 So. 2d 491 (Fla. 1947) (finding the challenged portion of the zoning ordinance impermissibly vague); *Reid v. Architectural Bd. of Review*, 192 N.E.2d 74, 77 (Ohio Ct. App. 1963) (refusing to strike down the challenged ordinance on vagueness grounds).

62. See *Sackson v. Zimmerman*, 478 N.Y.S.2d 354, 356 (N.Y. App. Div. 1984) (“In a word, the planning board’s denial must be based on evidence more substantial than a generalized feeling that neighbors should have the aesthetic pleasure of viewing a mansion on the central portion of a lot some four times the size of their own.”).

63. ZIEGLER ET AL., *supra* note 59, § 16:16; see also *Tennessee v. Smith*, 618 S.W.2d 474 (Tenn. 1981).

are unique to design professionals, they can be easily misunderstood by the general public (and are even subject to differing interpretations among design professionals). Nevertheless, they are frequently used in design guidelines. Because of their subjective meanings, these terms must both be defined and placed in context in order to avoid confusion. Relevant terms include: physical continuity, design harmony, unique character, environmental theme, articulation, modulation, rhythm, and human scale. Where there is confusion about the meaning of the terminology, there is room for a vagueness challenge. To survive a vagueness challenge, the “ordinance must enable a person of ‘common intelligence, in light of ordinary experience’ to understand whether contemplated conduct is lawful.”⁶⁴

The term “harmony” seems to be of particular attraction to courts, with judicial opinions both upholding and striking the term. In *Village of Hudson v. Albrecht, Inc.*,⁶⁵ the design ordinance instructed the board of review to “take cognizance of the development of adjacent, contiguous and neighboring buildings and properties for the purpose of achieving safe, harmonious and integrated development of related properties.”⁶⁶ The board was to make this determination taking into account “design, use of materials, finished grade lines, dimensions, orientation and location of all main and accessory buildings.”⁶⁷

The lawsuit was the result of the board’s attempt to stop the expansion of a portion of a shopping center that had not been approved by the board.⁶⁸ The property owner challenged the design controls as unconstitutionally vague.⁶⁹ The court, however, found otherwise, holding that the existence of other standards in the ordinance defined “harmonious” and required the project to be integrated with vehicular and traffic patterns, providing sufficient criteria to guide decision making.⁷⁰

Compare this result to *Anderson v. City of Issaquah*,⁷¹ one of the most recent and frequently cited design review cases, where the ordinance required among other things:

64. *Nadelson v. Township of Millburn*, 688 A.2d 672, 675 (N.J. Super. Ct. Law Div. 1996) (“The determination of vagueness must be made against the contextual background of the particular law and with a firm understanding of its purpose.”).

65. 458 N.E.2d 852 (Ohio 1984).

66. *Id.* at 854.

67. *Id.*

68. *Id.* at 853-54.

69. *Id.* at 854.

70. *Id.* at 856-57.

71. 851 P.2d 744 (Wash. Ct. App. 1993).

1. Buildings and structures shall be made compatible with adjacent buildings of conflicting architectural styles by such means as screens and site breaks, or other suitable methods and materials.
2. Harmony in texture, lines, and masses shall be encouraged.⁷²

The applicant sought to build a commercial structure for several retail tenants. The building described by the court “was to be faced with off-white stucco and was to have a blue metal roof. It was designed in a ‘modern’ style with an unbroken ‘warehouse’ appearance in the rear, and large retail style windows in the front.”⁷³ The surrounding area included a Victorian residence serving as a visitors center, an Elk’s hall, “a veterinary clinic with a cyclone fenced dog run,” a bank built in the “Issaquah territorial style,” and “a gasoline station that looks like a gasoline station.”⁷⁴

The board subjected the applicant to various revisions to the building design, including one commissioner’s personal observations from a drive down the main street on which the building was to be located, and the comment by another committee member that he wondered whether the applicant had no other option but to start again from scratch.⁷⁵ However, the court held otherwise, giving the following summary of the ordinance:

[W]e note that an ordinary citizen reading these sections would learn only that a given building project should bear a good relationship with the Issaquah Valley and surrounding mountains; its windows, doors, eaves and parapets should be of “appropriate proportions”, its colors should be “harmonious” and seldom “bright” or “brilliant”, its mechanical equipment should be screened from public view; its exterior lighting should be “harmonious” with the building design and “monotony should be avoided.” The project should also be “interesting.”⁷⁶

According to the court, “these code sections ‘do not give effective or meaningful guidance’ to applicants, to design professionals, or to

72. *Id.* at 746.

73. *Id.* at 747.

74. *Id.* (internal quotation marks omitted).

75. *Id.* at 748.

76. *Id.* at 751 (footnote omitted).

the public officials of Issaquah.”⁷⁷ The court found that “[t]he words employed are not technical words which are commonly understood within the professional building design industry. Neither do these words have a settled common law meaning.”⁷⁸

These cases show that courts have taken one of two approaches to undefined terms within design guidelines: (1) invalidating the ordinance on vagueness grounds or (2) upholding the ordinance after finding the term defined elsewhere in case law or other appropriate sources. For example, in *City of Mobile v. Weinacker*,⁷⁹ the court held that without definitions of terms such as “modern materials” and “modern architectural design” an aesthetic ordinance lacked “ascertainable criteria, requirements, or guidelines for approval” and was therefore impermissibly vague and ambiguous.⁸⁰ Compare this, however, to *State v. Wieland*,⁸¹ where the court looked to Iowa to borrow a definition of “neighborhood” and to Washington for a definition for “substantially” in order to uphold an ordinance.⁸²

2. *Procedural Due Process*

Due process has two faces. While substantive due process focuses specifically on issues relating to the clarity and scope of regulations, procedural due process seeks to determine the presence or absence of safeguards that prevent local decision-making bodies from making decisions in an unfair manner. Fairness with respect to the application of the law is at the heart of procedural due process. As aptly described in *Kenville Realty Corp. v. Board of Zoning Appeals*,⁸³ the “court must attempt to strike a balance between ‘strait-jacketing’ public officials and ensuring rule of law rather than by caprice.”⁸⁴

The courts will deem a local decisionmaking process fair if the local governing body has exercised all of the necessary safeguards required by law. Pursuant to traditional interpretations of procedural due process, city codes typically require public bodies to implement safeguards which entitle affected parties to notice of hearings held to consider such decisions, the right to the presentation

77. *Id.*

78. *Id.* at 752.

79. 720 So. 2d 953 (Ala. Civ. App. 1998).

80. *Id.* at 955.

81. 69 N.W.2d 217 (Wis. 1955).

82. *Id.* at 223-24.

83. *Kenville Realty Corp. v. Bd. of Zoning Appeals*, 265 N.Y.S.2d 522 (N.Y. Sup. Ct. 1965).

84. *Id.* at 524.

and rebuttal of evidence, and the issuance of final decisions containing findings of both fact and law.⁸⁵ However, the extent to which property owners are entitled to due process depends at least in part on whether the review powers of the local decision-making body are classified as legislative, administrative, or quasi-judicial. The final and perhaps most critical entitlement under due process is the right of appeal, either to a higher administrative or legislative body and then to the courts or directly to the courts.⁸⁶ In the presence of such procedural safeguards, courts will defer to the decisions of local governing bodies so long as the decisions are reasonable.

The question remains: are form-based codes more susceptible to procedural due process claims than zoning ordinances? The answer to this question is likely yes. The main obstacle for form-based codes comes from a governing body's stated reasons for decisionmaking. Zoning ordinances, by their nature, are specific as to how a structure may be built and used in a given location. Thus, when a decisionmaker denies an application for a building permit, variance, or rezoning under a traditional zoning ordinance, the denial is tied to a specific provision in the ordinance which disallows either the structure or the use. Decisionmakers have little discretion in the presence of such specific rules and, as a result, their decisions will typically stand unless proven arbitrary or capricious.

Form-based codes, however, are not intended to be as rigid. These codes act more like guidelines but provide little guidance as to what must be permitted or prohibited. While the flexibility of these codes may improve the overall mixture and quality of development in a given transect, too much discretionary power may be vested in the hands of decisionmakers who have very limited working knowledge of the architectural, urban design, or planning principles upon which these ordinances are derived. For example, a city might seek to draw a transect around an area containing a city's historic downtown. A problem arises if one of the governing principles of the transect is to promote new development that is architecturally appropriate to the downtown's historic character. While many members of local decisionmaking bodies might "know it when they see it," it is unlikely that such decisionmakers will be able to reduce what they know to a legally defensible final decision. A planning staff with special expertise in architecture or urban design may be able to assist local decisionmakers in overcoming

85. DAVID H. CALLIES ET AL., *CASES AND MATERIALS ON LAND USE* 501 (3d ed. 1999).

86. Daniel R. Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. U. L.Q. 60, 80-82 (1963).

ing this problem; however, the discretionary nature of these codes still leaves cities open for litigation, particularly when one interpretation permits a development proposal but is used to deny a similar one.

C. Takings

In *Dallen v. City of Kansas City*,⁸⁷ the Missouri Court of Appeals struck down an ordinance requiring property owners seeking to rebuild a gas station to rebuild in conformance with an overlay zone. The overlay zone, also known as the Main Street Corridor Special Review District, established a “build-to line” that would have required the new gas station building to be located at a ten-foot setback from the property line.⁸⁸ The property owners claimed that this was impossible, but the terms of the overlay district would not have permitted the property owner to rebuild in accordance with the terms of the underlying district.⁸⁹ The court found the two regulations (overlay and underlying) in conflict and found the overlay district to be confiscatory and unconstitutional and therefore invalidated the entire overlay.⁹⁰ This decision included not only the ten-foot setback, but also “the regulation of building materials, the parking regulations and the restrictions applying to signs, building entrances and windows.”⁹¹ Despite the holding’s outward appearance, it was probably not an indictment of form-based zoning in Missouri. This likely extends to Kansas City, where planning staff is busy putting the finishing touches on a new hybrid zoning code to replace the 1954 version.⁹²

So if this is not the taking issue, what is? The issue probably exists in the communities that adopt form-based codes requiring all development to be mixed use. If an applicant has a small parcel—a single lot of infill or minimal acreage of new development—where, for a variety of reasons the market will not support mixed use, then is it possible that the property has been inversely condemned by the regulation? Inverse condemnation could be possible in many situations, for example, where the development is in a greenfield and commercial uses will not be viable for some time, or when the infill is in a neighborhood that is converting from resi-

87. 822 S.W.2d 429 (Mo. Ct. App. 1991).

88. *Id.* at 433.

89. *Id.*

90. *Id.*

91. *Id.* at 434.

92. See *Zoning Ordinance and Subdivision Regulations Revision Process*, City of Kansas City, Missouri, <http://www.kcmo.org/planning.nsf/devmgt/ZonOrdRevisProces?> (last visited May 10, 2008).

dential to commercial and there is no demand for additional residential space, or when the site is so small that it is not really feasible to build a structure large enough to house multiple uses. In a worst-case scenario, the applicant is not allowed to build. This could be a *Lucas*⁹³ taking, where the owner is deprived of all economic benefit or productive use of the land.⁹⁴ In a slightly less drastic scenario, the applicant is allowed to build but is required to allocate or reserve space for future uses. Would this be a physical taking following *Loretto*⁹⁵ and *Nollan*,⁹⁶ or a categorical taking following *Dolan*?⁹⁷ This line of reasoning will probably develop as form-based codes mature.

D. Spot Zoning

A possible challenge to spot zoning exists for communities that choose to review neotraditional development through their existing regulations using a series of variances. Spot zoning arises in situations where there is “the rezoning of a single parcel or a small area to benefit one or more property owners rather than carry out an objective of the comprehensive plan.”⁹⁸ Having a neotraditional plan or policies in place may help because “courts look to the community’s comprehensive plan, or to other planning studies, in determining whether the rezoning is, in fact, consistent with local land use policies.”⁹⁹ Overall, courts will consider:

1. the size of the parcel subject to rezoning;
2. the zoning both prior to and after the local government’s decision;
3. the existing zoning and use of the adjacent properties;

93. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

94. BRIAN BLAESSER & ALAN WEINSTEIN, *FEDERAL LAND USE LAW AND LITIGATION* § 3:19 (2006).

95. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (concluding that a permanent occupation of property is always a taking).

96. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987) (holding that a regulation must substantially advance a legitimate state interest with sufficient connection between the interest and the regulation in order to justify the imposition).

97. *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (determining that there must be an essential nexus between a condition imposed and the legitimate state interest).

98. Rielly, *supra* note 57, at 61 (internal quotation marks omitted) (quoting JOHN R. NOLAN, *WELL GROUNDED: SHAPING THE DESTINY OF THE EMPIRE STATE* 446 (1999)).

99. Robert C. Widner, *Understanding Spot Zoning*, 13 *PLANNING COMM’RS J.* (1994) available at <http://www.plannersweb.com/articles/wid060.html>.

4. the benefits and detriments to the landowner, neighboring property owners, and the community resulting from the rezoning; and
5. the relationship between the zoning change and the local government's stated land use policies and objectives.¹⁰⁰

An understanding of local judicial willingness to find spot zoning may be helpful before starting a neotraditional approval process that will be based on variances.

E. The Nature of a Regulating Plan

According to the logic behind form-based codes, the plan is the key to the entire process. The plan should, therefore, correspond directly to the regulations. In some states, regulatory consistency with the comprehensive plan is mandatory, for example, the plan and regulations should work together and mirror one another.¹⁰¹ In some states, however, the plan and the regulations only need to be "in accordance with" one another.¹⁰² This leaves room for interpretation, and typically judicial opinions in each state define the level of closeness required by the phrase "in accordance with."¹⁰³

This leads to some technical questions. First, is the plan adopted as part of the regulations? If this means the regulating plan, the answer is yes. There is law that holds that a comprehensive plan can be contained in a "zoning ordinance if the zoning ordinance is comprehensive in scope and establishes 'an orderly method of land use regulation for the community.'"¹⁰⁴ If so, then is the regulating plan amended in the manner prescribed for regulatory amendment? And what if the jurisdiction has legal review procedures for comprehensive or master plans (for example, annual review or five-year review), does the regulating plan have to comport with these requirements? And if the plan is not adopted as part of the regulations, but rather as a separate area or community plan, can the regulations deviate from the plan? This list continues, highlighting some of the issues caused by the cross-over of planning and regulating. As one commentator notes, neotradi-

100. *Id.*

101. Brian W. Ohm, *Let the Courts Guide You: Planning and Zoning Consistency*, 22 ZONING PRACTICE 1 (2005).

102. *See, e.g.* Trail v. Terrapin Run, 943 A.2d 1192, 1204-05 (2008).

103. *Id.* at 1226.

104. PETER W. SALSICH, JR. & TIMOTHY J. TRYNIECKI, LAND USE REGULATION: A LEGAL ANALYSIS AND PRACTICAL APPLICATION OF LAND USE LAW 40 (1998) (quoting Bell v. City of Elkhorn, 364 N.W.2d 144, 148 (Wis. 1985)).

tional regulation may be “new tricks for an old dog.”¹⁰⁵

F. The Use of Graphics and Concerns Regarding Copyrights

Unlike most older conventional regulations, form-based codes are graphics laden. This may be a welcome inclusion for those who negotiate their way through the regulatory process, but it may be problematic in a legal venue. As a practical matter, graphics such as drawings, renderings, and photographs should be clearly labeled as either illustrative or regulatory.¹⁰⁶ If graphics are regulatory, it is wise to provide written guidance to match the intent of the illustration, both in the form of labels on the illustration and text with the regulation.

In the best of all worlds, each jurisdiction will have created individual graphics and illustrations that are specifically representative of that community. Realistically, however, a limited number of communities with great resources will take this approach, and others will search creatively to illustrate their regulations at a lower overhead level. With the advent of the internet, it is possible to gather all kinds of illustrations from various locations. Historically, public codes have not been copyrighted information, and some form-based code and related New Urbanist initiatives have included copyrighted materials. It is important to either gain permission for the use of the graphics or to find something available in the public domain.

V. CONCLUSION

In the quest to build cities which are both beautiful and functional, urban planners have sought to implement a variety of land use and design related tools which emanate from historic zoning codes. The form-based code is the newest tool in the evolution of this pursuit for better city planning. While it is unlikely that the form-based code will entirely replace conventional zoning, there exists a strong likelihood that this regulatory tool will have a role in shaping and reshaping cities across the United States. Communities employing this tool must understand, however, that the form-based code does not offer a cure for all urban problems; nor will the implementation of these codes be free from dispute. Careful consideration of possible legal challenges to the form-based

105. Joel P. Dennison, Comment, *New Tricks for an Old Dog: The Changing Role of the Comprehensive Plan Under Pennsylvania's "Growing Smarter" Land Use Reform*, 105 DICK. L. REV. 385 (2001).

106. CODIFYING NEW URBANISM, *supra* note 12, at 15.

code is the only way to ensure that these new picture-laden codes for land development become more than just imaginative stories about a possible new approach to urban development.

