

# Form Based Codes and the Municipal Land Use Law— Perfect Together?



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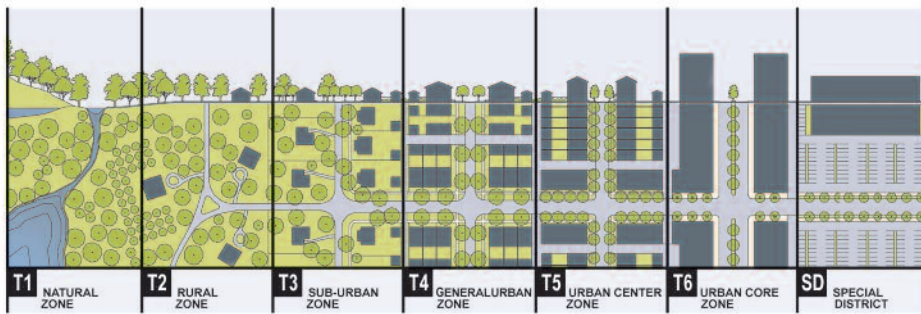
The recent growth of the “New Urbanization” movement in the planning community finds us increasingly dealing with the overall problems from a different standpoint. Many of the traditional zoning concepts we have become accustomed to have been de-emphasized. In addition the use proposed for affected property, much of the emphasis on the shape, size and location of buildings, and their relationship to street networks, landscapes and architectural requirements has changed. This more recent approach is commonly referred to as Form Based Codes (FBC). Although the FBCs arose from urban concerns and are directed primarily at those problems, their proponents claim they will be equally effective in suburban and rural areas.

IF FBCS BECOME A REALITY, THE PLANNING COMMUNITY AND THE PUBLIC AT LARGE WILL HAVE TO LEARN A NEW LEXICON AND A NEW WAY OF THINKING ABOUT FUTURE DEVELOPMENT IN THE WIDELY DIVERSE GARDEN STATE.

The FBCs contain many new terms, such as “transect,” which may be defined as a framework that identifies a continuum of different but related habitats and environmental areas, applying the concept to the densest megalopolis to the most sensitive rural farmlands steeped in wetlands. Through this continuum, municipal zoning categories must rationally evolve from the most complex urban FBCs to much simpler ones in rural areas. The FBCs have their genesis in the “Smart Growth” concept and trend, as championed by the New Jersey Office of Smart Growth in the Department of Community Affairs.

The pictures, buildings, streetscapes and aerial plans of developed and planned development areas dominate the State Plan and Redevelopment Plan and related documents generated by the Office of Smart Growth, and expose the planning community to the FBC concept on the macro level. The concept is not limited to New Jersey. It is a phenomenon planners around the country are becoming aware of, and to differing degrees, embracing.

Most of those who do not live in urban areas have not had substantial exposure to FBCs. The FBCs look like a matrix of diagrams and charts, seeking to display graphically how buildings will appear, regardless of their current



A TYPICAL RURAL-URBAN TRANSECT, WITH TRANSECT ZONES

or future uses. FBCs include information on defined streets, open areas, and particularly architectural controls. Additionally, the FBCs prescribe what structures will be built on what streets as part of or near public areas, and dictate building appearances.

Finally, a fundamental element in the FBC process is a "vision" or key map quite unlike a zoning map. It is created through a process of "public visioning" often in the form of a "charette" where professionals in various disciplines plan directly, with public input, how they want the community or a portion of it to look. (See: [www.charetteinstitute.org](http://www.charetteinstitute.org) for a description of this process.)

The above brief description is an oversimplification, since a well crafted FBC does allow for some flexibility. Examples of this type of development control may be seen in recent Jersey City large developments, often dealing with blocks at a time. Many recent municipal ordinances are derived from the often cited "Smart Code," a model design and development code released by Duany Plater-Zyberk and Company (DPZ) in 2003, after two decades of research and implementation. The "Smart Code" may be viewed at [www.smartcodecentral.com](http://www.smartcodecentral.com).

In New Jersey, the enabling statute for local zoning and planning is encompassed in the Municipal Land Use Law of 1975. NJSA 40:55D-1 et seq. (MLUL). Clearly New Jersey's MLUL is based upon traditional "Euclidian" (*Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926) concepts of planning by limiting or proscribing uses and juxtaposing compatible uses. For example, single family and multifamily residential, retail but not mixed with industrial and so forth. Under the purposes section of the MLUL the first purpose recited is: "to encourage municipal action to guide the appropriate use or development of all lands in this State, which

will promote the public health, safety, morals and general welfare. NJSA 40:55D-2(a). Further under the MLUL's



zoning powers: "the governing body may adopt or amend a zoning ordinance relating to the extent of the uses of land and of buildings and structures thereon." NJSA 40:55D-62(a).

While there are provisions in the MLUL which lend support to allowing Form Based Zoning i.e. promotion of aesthetic and transportation routes, it is beyond the scope of this article to analyze whether these new FBCs are sanctioned under the MLUL or New Jersey case law. There is some favorable language for Codes in the New Jersey (Constitution Article 4 section 6 paragraph 2), but the MLUL does not repeat that language with the same emphasis. There is also some favorable enabling language under the planned development provisions.

FBCs are largely pictorial and graphic rather than a traditional narrative of master plans and zoning ordinances. One positive of this approach is better identification of exactly what can and will be built, down to the details such as the exact setback from the street and the shape of the lampposts. Codes will also allow the general public to understand how the property will ultimately look after development and arguably simplifies public review of the FBC. Often the narrative contained in current zoning and planning ordinances do not allow lay people to understand what the project will look like and how it will function, partly because the developer will largely control the design. Instead of hundreds of pages of narrative which often interrelate in a complicated and sometimes confusing concoction, theoretically the FBC diagrams will describe design parameters on a single or a few pages.

The downsides are equally apparent. FBCs prescribe what must be built and include aesthetic standards premised on the justification that such is the community "vision." New Jersey has a history of wariness about such predetermined aesthetic or architectural standards for any kind of development, major or minor. Historically these type of ordinances have been extremely hard to prepare and even more difficult to administer. Many New Jersey zoning and design regulations seem to be somewhere between mandated and recommended standards. Property owners still prefer, and some will demand, some freedom of choice. It is also not

clear how private rights in lawful non-conforming uses and structures and federally mandated uses (as opposed to structures) such as the Fair Housing Amendments Act, the Telecommunications' Act and the Religious Freedom Act (RLUIPA) fit into an FBC scheme.

Proponents also claim that FBCs would lessen the adversarial atmosphere which accompanies most development applications. The use of legal terms which often can only be deciphered (if at all) by attorneys, engineers and planners would be downplayed. The lay person and Board member could more easily envision what buildings and structures are being approved. The FBCs would be shorter and presumably easier to understand. Further, if the standards, particularly the aesthetic standards, are detailed, there would be less chance of subjective decision making.

But there are also downsides to these claims. First, there are constitutional aspects of freedom of individual and commercial speech as well as substantive and procedural due process rights of individuals. In the FBC approach architectural and aesthetic issues have been predetermined for the property

owner. Secondly, there is the FBC concept that a building or streetscape has to be built exactly one way and only one way, a problem not encountered in the private sector. If a property owner won't, or more importantly, cannot build as envisioned and directed by an FBC, the property owner could be subjected to having to obtain variances or similar relief, which often results in expensive and possibly illegal exactions from the Board. Thirdly, in an FBC-based planning world, what would be the function of Planning and Zoning Boards once the visioning is accomplished? Would they operate as architectural or aesthetic boards since the blueprint for the community has already been carefully drawn with great detail? Would they meet to decide what to do only when the developer cannot comply with the FBC? Finally, FBC advocates claim pictures are worth a thousand words but even pictures or diagrams can be vague, incomplete, or applied in an arbitrary way.

It is unlikely the adversarial process will disappear in an FBC-based world. It will probably engender more litigation, since it can provide no comparable 84

year history and experience in zoning and planning concepts as established by the legislatures and courts in the traditional use based zoning arena.

Since there is widening interest in both the private and public planning community to adopt FBCs, it is likely that here in New Jersey or nationally there will be another case similar to the Euclid case mentioned above which will define whether FBCs will complement, supplant or replace the traditional methods of use zoning. Certainly changes would have to be made to the MLUL to further enable FBCs, if not outright authorize them. If FBCs become a reality, the planning community and the public at large will have to learn a new lexicon and a new way of thinking about future development in the widely diverse Garden State. It will be challenging. ▲

Mr. Clark is a senior partner of Laddey, Clark & Ryan, LLP, Sparta, New Jersey and Chair of the Firm's Land Use practice group. He is a co-author of William M. Cox's book *New Jersey Zoning and Land Use Administration*, published by Gann Law Books, the "Bible" in New Jersey land use practice. Mr. Clark currently serves as Vice Chairman on the Land Use Drafting Committee of the League of Municipalities.

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