

Adopting Form-Based Codes

(And Reducing the Potential for Successful Challenges)

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FBC 101

OCTOBER 17, 2016

FBCI WASHINGTON, D.C.

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Overview

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- General Standards for Regulatory Amendments
- Adoption Mechanics
- Reducing the Potential for Challenges

General Standards for Regulatory Amendments

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- The Role of the Comprehensive Plan
- Public Health, Safety & Welfare
- Change or Mistake Rule

General Standards

The Role of the Comprehensive Plan

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- Mandatory v. Advisory
- Specific Plan Jurisdictions
- “In Accordance With” & “Consistent With”

General Standards

Public Health, Safety & Welfare

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- The Police Power Protects the Public Health, Safety and Welfare
- *The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled.*

-- *Berman v. Parker*, 348 U.S. 26

(1954)

General Standards Change or Mistake Rule

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- Usually Applicable to “Piecemeal” Map Changes
- Justification of Proposed Amendment:
 - The Character of the Neighborhood Changed; or
 - A Mistake was Made in the Original Zoning

Adoption Mechanics

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- Setting the Stage for Approval of the Code
- Preparing and Filing Code Amendments
- Public Hearing(s)
- Perfecting the Decision

Adoption Mechanics

Setting the Stage for Approval of the Code

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- Engage the City Commission in the Visioning
- Charette as a Technique to a **Shared Physical Vision**
- Educate Public & Private Stakeholders
 - Presentations in the Community
 - Test Proposed Regulations on Properties
 - Use the Internet, Including Social Media. Create a Website. Update Information Frequently

Adoption Mechanics

Setting the Stage for Approval of the Code

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- Deploy Regulations to Invite (not to Discourage) Development that Is Consistent with the Physical Vision of the Community Expressed in the Code. Code Should Treat Developers as Partners in Implementing the Community's Vision.
- Minimize the Time Between Completion of the Vision Plan and Adoption of the Code

Adoption Mechanics

Preparing Code Amendments

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- Verify Local Requirements
- Complete, Neat and Organized
- Graphics as well as Text
- Location(s) in Public Offices
- Promote Review by Interested Parties
- Use the Internet! (Miami 21)

Adoption Mechanics

Public Hearing(s)

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- Verify State/Local Requirements for Hearing(s), Including Time and Location of Hearing(s) and Timing and Placement of Notice(s)
- Will Body Conducting hearing Be only Advisory or the Final Decision-Maker?
- Special or Regular Meeting
- Single or Multiple Sessions
- Notices Should Be Descriptive – Use Graphics!
- Go Above & Beyond in Conforming to Notice in Media.
- Use the Internet!

Adoption Mechanics

Perfecting the Decision

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- Verify State/Local Requirements for Publication
- After Adoption Finish What You Started – Publish the Code, Including Graphics, in Municode, etc.
- Add the Code, Including Graphics, to City Website.
- Maintain the Code, Including Amendments and Updates.

Reducing the Potential for Challenges

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- Sound Basis in Planning
- Notice Properly
- Hold a Fundamentally Fair Hearing
- Support the Decision
- Link to Enabling Legislation
- Keep in Mind State & Federal Statutes
- Examine Nonconformities
- Understand Uniformity
- Avoid Vagueness
- Avoid *Ultra Vires* Delegation
- Establish Clear Processes

Reducing the Potential for Challenges

Sound Basis in Planning

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- Generally Addressed Through Charrette Process
- Relate Code to the Comprehensive Plan
- Explain Relationships on the Record
- Draft a Supportive Purpose Statement

Reducing the Potential for Challenges Notice Properly

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- In many States, Decision Can be Vacated if Hearing is Improperly Noticed
- Keep proof on File

Reducing the Potential for Challenges

Hold a Fundamentally Fair Hearing

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- Explain the Rules of Each Hearing Up Front
- Treat Hearing as Another Opportunity for Education
- Make it a Meaningful Dialogue – Make Sure the Audience Microphones Work
- Have a “Plan B” Location

Reducing the Potential for Challenges

Support the Decision

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- Legislative Acts Enjoy Presumption of Validity
- Need to Demonstrate that Elected Officials' Actions Are Not Arbitrary or Capricious
- Incorporate Findings of Facts in the Ordinance

Reducing the Potential for Challenges

Link to Enabling Legislation

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- Draft a Supportive Authority Statement
- Delegation of State Authority to Regulate Land Use
 - PA & WI Expressly Enable “TND”
 - CA Expressly Enables FBC
 - Home Rule States
- Promotion of “Innovative” Regulations
 - Florida
 - Rhode Island
 - South Carolina

Reducing the Potential for Challenges

Keep in Mind Federal & State Statutes

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- Fair Housing Amendments Act
- Telecommunications Act
- Religious Land Use and Institutionalized Persons Act
- Americans With Disabilities Act

Reducing the Potential for Challenges

Examine Nonconformities

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- Amended Land Development Regulations Should Seek to Minimize Creation of Nonconformities
- Not Just Uses
- Consider Allowing Amortization of Non-Conforming Conditions
- Protect Vested Rights

Reducing the Potential for Challenges

Understand Uniformity

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Constitutional Protections: Regulations Should Equally Affect Like-Situated Properties

- Origins in SSZEA and *Euclid*
- Create an Internally Consistent District
- Learn from PUDs – Follow Clearly Stated Urban Design Principles, not Ad Hoc Dealmaking to Appease Elected or Demanding Neighbors

Reducing the Potential for Challenges

Avoid Vagueness

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Design Guidelines can prove to be a legal minefield. Guidelines are a combination of law and design administered by committee and applied to a property owner seeking development approval. The number of imaginable problems with this scenario is immeasurable.

Garvin & LeRoy, “Design Guidelines: The Law of Aesthetic Controls,” Land Use Law & Zoning Digest, April 2003 at 6.

Courts readily reject decisions by non-elected bodies based on vague, standardless criteria such as “community character.”

Reducing the Potential for Challenges

Avoid Vagueness

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- Clarity of Vision is Key (regulating plan helps)
- Design Guidelines v. Standards
- Terms to worry about
 - “Quality of Life”
 - “Community Character”
 - “Consistent with” / “Different From”
 - “Should” (Rather than Shall)
- Illustrations: Use Photos to Support Diagrams

Reducing the Potential for Challenges

Avoid *Ultra Vires* Delegation

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- Avoid Standardless Administrative Approvals
- Town Architect Review – Needs Clear Direction
- Provide Clear Standards In Codes for Non-Elected Review Bodies (Such As Zoning Appeals Board, Planning & Zoning Boards) that Render Decisions On Codes.

Reducing the Potential for Challenges

Establish Clear Processes for Review & Approval

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- Treat Applicants as Partners Implementing Community Vision
 - Path To Approval Should Be Easily Understood
 - Encourage Pre-application Conferences
 - Provide Multi-Disciplinary Review Team – Avoid Back & Forth
 - Not Every Situation Can Be Accounted For
- Create Administrative “Safety Valves” To Ensure Flexibility
(Historic Structures, Specimen Tree, Steep Slope, Etc.)
- Administrative Modification (Proposed Building Meets Grandfathered Building With Non-conforming Setback)
 - Zoning Boards Of Appeal
 - ✦ Hardship Variances: for Uses and Dimensional Standards
 - ✦ Certain Special Permits