University of Cincinnati

Date: 3/14/2013

I, John M Yung, hereby submit this original work as part of the requirements for the degree of Master of Community Planning in Community Planning.

It is entitled:
Decoding Bellevue: A Path Forward for Bellevue’s Form-Based Code

Student's name: John M Yung

This work and its defense approved by:

Committee chair: Marisa Zapata, Ph.D.

Committee member: Francis Russell, M.Arch, B.A.
Decoding Bellevue: A Path Forward for Bellevue’s

Form-Based Code

A Thesis

In partial fulfillment of the requirements for the degree of:

MASTER OF COMMUNITY PLANNING

School of Planning

College of Design, Architecture, Art, and Planning

University of Cincinnati

2013

By John Yung

B.A. Political Science & Philosophy, Muskingum University, 2005

Committee Chair: Dr. M. Zapata

Committee Member: Prof. F. Russell
Abstract

This thesis is not a traditional thesis; rather, it is a thesis project, applying academic knowledge to a real-world project, reflecting the unique needs of preparing graduate students to practice planning. The thesis project analyzes optional alternatives for the expansion of a form-based code in the City of Bellevue, KY. It reviews the pertinent literature regarding the legal feasibility of form-based codes and reviews the steps the City of Bellevue has taken to arrive at implementing its own form-based code. From that point, this paper reviews five possible paths forward for the city including full zone change, overlay zoning, phased zoning, text alterations or maintaining the status quo. The paper analyzes these metrics on several criteria including political and legal feasibility and types of development outcomes.

The paper finds that form-based codes are a step in the right direction for communities but only if they are adopted with strong input from the community and stakeholders. Further it finds that the strength of the existing zoning, parking requirements and continued citizen engagement are factors in determining which path a community should take in determining the path forward for optional and mandatory implementations of a form-based code.
About the Author

John Yung is currently serving as the Zoning Administrator for the city of Bellevue, KY. He has served in this position for over six years. As Zoning Administrator his primary job is to enforce the city’s zoning ordinance and serve as staff support the Planning and Zoning Commission, Board of Adjustments and the Tree Commission. Additionally, his office provides GIS mapping services, Floodplain Administration, and zoning code enforcement. He is an International Code Council certified residential building inspector and coordinator for the On-Street Handicap Parking Program.

Acknowledgment

What follows below is a labor of love. I came to this profession because of unintended life experiences of living in a walkable place and transitioning to suburbia. In my younger years I searched for the reasons why and only discovered them after taking a class in college where the required reading was “Suburban Nation” by Andres Duany. From then on I became interested in the development of places through zoning and land use, form-based codes and walkable environments. So these are the people I want to thank for what has been an incredible journey down the rabbit hole of city planning, urbanism, zoning, placemaking and new urbanism.

I would like to thank my advisor and committee chair Dr. Marisa Zapata for her steady guidance and support through the thesis process. I would also like to thank Professor Frank Russell, for serving on the thesis committee and his support and critical evaluation throughout the process. Finally, I would like to thank Dr. Walter Huber who without his guidance and influence I would not be on the path I am today.
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Chapter 1: Introduction

1.1 Introduction

Zoning regulations have long dominated the discussion of land usage in cities throughout the twentieth century. These regulations were centered on the separation of uses, a method made legal by the 1926 Supreme Court case Village of Euclid v. Ambler Realty. However the separation of different uses, intended as a public health solution to the rapid industrialization of American cities was one of the main contributors to the rise of suburban sprawl and the domination of automobile culture after the Second World War. As the century drew to a close a new movement arose, born out of the desire to construct new pedestrian focused developments made illegal under many Euclidean zoning codes. These roguish usurpers of conventional zonings status quo labeled themselves New Urbanists and began to test their theories by creating a series of new communities in green fields across the country. These initial communities and the study of other traditional towns and cities led to the rise of a zoning alternative known as form-based codes.

Form-based codes seek to regulate the building and its relation to the street and sidewalk through a combination of consolidated regulations. These codes tend to emphasize the form of the building over its function. Even though form-based codes are presented as an alternative to conventional Euclidean based zoning codes, their implementation is typically done under the guise of conventional zoning. Though it is not the intent for municipalities implementing such codes to deceive or mislead the public, code implementation is largely done in accordance with state zoning legislation which typically does not directly address some of the issues a form-based code may address.
This mismatch, although addressed by some states with updated land use regulation language can leave this new phenomenon in land use regulations exposed to legal attack. While form-based codes have not been directly challenged in courts, some of the tenants espoused by New Urbanists and incorporated into form-based codes have. Land use regulations can be challenged on four different grounds, takings, vagueness, substantive due process and procedural due process. It is important to measure the impacts of these types of decisions when evaluating new land use regulation strategies.

The SmartCode, a type of form-based code, was recently adopted by Bellevue, Kentucky. The small city of one square mile is located directly across from downtown Cincinnati and is known as a charming historic river city. After a process that spanned several years, the city conducted a brief charrette, otherwise known as a visioning workshop, in 2010 and adopted the code in 2011. The adopted code is mandatory only in certain parts of the city and has presented opportunities and challenges for the city’s staff. City officials are looking to expand the form-based code but are evaluating the best method to move forward.

1.2 Problem Statement

The city of Bellevue had already adopted the code as mandatory in parts of the city. The overarching question that this thesis will address is to determine the best option for the city to proceed forward. Is utilizing the existing zone change strategy the best solution? Or perhaps the city should pursue development of a code where property owners can choose which type of regulation to adhere to? This could be more appropriate to land owners who are concerned about needing flexibility with the regulation of their property. What are the legal pitfalls of the available options? Some of the possible ways to proceed have not been tried before in the state of
Kentucky. Finally, which option presents the best development scenario for the developers and the city?

It is the belief of the author of this thesis that while the zone change is the most practical solution it may not be the best. The city has not benefited as expected with the mandatory implementation of the form-based code as will be described in this thesis. An optional code, one that allows for properties to opt-in to the code, should allow for greater acclamation to the form-based code by property owners, developers and city staff alike.

This thesis will focus on the history and need for land use regulations, zoning implementation in the United States and legal challenges to the central elements to form-based codes. Then a matrix of implementation strategies will be presented in the context of Bellevue and Kentucky’s existing zoning enabling regulations. Development scenarios will be deployed to test the effectiveness of the different methods which will then be evaluated based on a ratings criteria. The method with the highest score will be determined to be the best method for the scenario situation.
Chapter 2: Literature Review

There have been a number of articles, books and literature written regarding the need for zoning reform through form based codes. This section seeks to identify pertinent pieces of literature for the purpose of furthering and strengthening an already adopted form based code. It will provide a general overview of literature highlighting the perceived strengths of a form-based code over traditional Euclidean zoning with special attention regarding the SmartCode. It will also review literature regarding different implementation strategies as well as legal challenges regarding aspects of form-based codes.

2.1 The Evolution of Zoning and the rise of New Urbanism

Land use regulations are not new. They did not begin with zoning and they will not end with the types of codes promoted by New Urbanism, Smart Growth, or whatever movement supersedes them. The need to regulate the built environment, either through form or function has been cornerstone of civilization. Most famously, the Hammurabi Code sentenced a builder to death if the structure he built failed (Law # 233) (http://eawc.evansville.edu/anthology/hammurabi.htm). In early European cultures, society saw the need to develop regulations for building setbacks and building construction standards. Many of these laws laid the basis for the first building codes. The codes dealt with such complexities, “as obstruction of views, blockage of light, partly walls and projections” (Talen 2009). Codes also were developed to ensure a healthy population that would reduce the instances of petulance.

Code development in America was largely influenced as a reaction to what did not work in European cities. The layout of cities by grid had the intention of maximizing land access and providing order in comparison to the chaotic layout of European cities through the 18th Century. By the time the United States had declared its independence and forged a new nation in America,
the founding fathers hired French architect, Pierre Charles Le ‘Enfante to design the national capital, Washington D.C. To this day, a strict code governs the placement and height of new buildings in Washington D.C. In this case, a plan was envisioned and a code was developed to execute the plan (Talen 2012).

American cities continued to develop but as the Industrial Revolution reshaped the world, including America, cities became health and safety hazards. By the beginning of the 20th century, cities had become polluted, crowded, noisy and dangerous. In many instances, factories were located directly next to tenements. Rivers, canals and other bodies of water had become contaminated with sewage and trash was breeding grounds for disease. There were few regulatory controls to limit the negative consequences of industrialization (Talen 2009). In response, cities such as New York City began to adopt zoning ordinances. New York’s zoning ordinance was the first adopted code that regulated setbacks and uses. Use regulation was seen as a key factor in separating residential uses from industrial uses. Over the next decade, similar zoning ordinances had been adopted in many other cities across the nation.

The key validation to zoning however was the landmark Supreme Court case Village of Euclid, OH v. Ambler Realty (Village of Euclid v. Ambler Realty Co. 272 U.S. 365 (1926)). The case, in which Ambler sued the village for unfair takings by limiting its use, was brought before the U.S. Supreme Court in 1926. The Euclid zoning ordinance had divided areas of the village into six different zoning classifications. The appellant’s property was zoned residential. The court upheld the Euclid zoning ordinance on the basis that the zoning code was implemented to protect the health, safety and general welfare of the villages’ citizenry.

Further validation was made with the passing of national zoning enabling legislation with the signing of a bill the same year as the Euclid Supreme Court case by President Herbert
Hoover. The enabling legislation gave states the ability to create their own legislation supporting zoning for local municipalities (Standard State Zoning Enabling Act). By this time nearly 800 cities across the United States had zoning based on the Euclidean model (Talen 2009).

Euclidean zoning, as the model became known, is characterized by the separation of uses into three different categories: Residential, Commercial and Industrial. Over time these classifications expanded to include agriculture and conservation zones but coupled with the expanding usage of the automobile, the regulations commonly produced homogenous results. Low density office parks, cul-de-sac communities, and shopping plaza's became the result of Euclidean Zoning and the effects of this pattern of development harmed public health, the environment and central cities (Blasingame Custer 2007).

Over the ensuing decades Euclidean zoning began to etch its influence on the American urban landscape. Federal highway construction and housing subsidy helped encourage many Americans to move to the underdeveloped suburban communities surrounding central cities. As suburbs grew, cities demolished urban fabric to satisfy off-street parking requirements and new car accessible urban renewal schemes. The decline of urban cities and the proliferation of sprawl meant more people in more automobiles which created more traffic, led to more health problems, loss of time and productivity and sedentary lifestyles (Duany, 2000).

Innovations in zoning were devised to remedy the already apparent negative effects of zoning. Performance zoning, planned unit developments (PUDs), overlay zoning and other tools were developed by planners to allow municipalities’ greater discretion in reviewing development proposals (Sitkowski 2003). These innovations allowed greater master planning, the large scale development of assembled properties by a developer, in communities but did little to mitigate the continued construction of single use sprawl that began to dominate the American landscape.
The planned unit development especially gave flexibility to communities looking to integrate different uses together. The concept enabled municipalities to create custom zoning standards to allow standards that were either not available in the conventional code or not allowed. PUDs could even enable the mixing of uses within the same building, a concept that disappeared under the standard Euclidean model (Sitkowski 2003).

It was through PUDs that many of the early New Urbanist concepts were implemented. In the 1980’s developer and architect Andrés Duany challenged the concept that pre-World War II development had been made almost impossible to implement across the country. In 1986, his firm Duany, Plater-Zybeck Inc. designed and built Seaside Florida to test the concept that traditional neighborhoods could not only be built but also be desirable. The community quickly became one of the most desirable communities in the country (Duany 2000).

The desire for Seaside and the subsequent communities designed afterward was not that it was old or nostalgic but instead that it appeals to the desire for buildings that were oriented towards people instead of automobiles, walkable streets that felt like a community and shops and jobs that were more accessible without an automobile. Houses had front doors, garages in the back. Alleys were provided to serve as access to the garages and for trash pick-up. Sidewalks were mandatory. Many of these concepts had been discarded after decades of Euclidean zoning which enabled developers to build the same thing in endless repetition (Duany 2000).

Like Washington D.C. before it, Seaside had been built with a vision and a code that established the form in which the community would be designed and regulated under. One element was that the community had to be designed with a focus on pedestrians. Second the community utilized a mix of uses in its commercial districts as opposed to strip shopping centers that were commonly constructed across the country. Third, the streets must be designed to slow
traffic instead of allowing cars to go from point A to point B as fast as possible (Duany 2000). Seaside not only went on to become one of the most successful new communities created in the past thirty years but also became an integral part of the foundation of form-based codes and the SmartCode model ordinance (Duany 2009).

Seaside proved to be a success and over the ensuing years Duany, Elizabeth Plater-Zybeck, Peter Calthorpe and Peter Katz formed the Congress for the New Urbanism. According to Sitkowski (2003), the group was founded under the principles that:

“*Neighborhoods should be diverse in use and population; communities should be designed for the pedestrian and transit as well as the car; cities and towns should be shaped by physically designed and universally accessible public spaces and community institutions; urban places should be famed by architecture and landscape design that celebrate local history, climate, ecology, and building practice.*”

New Urbanists claimed that conventional zoning was not only anti-urban but also anti-environment in the sense that single use zoning enabled sprawl which tends to destroy rural and preserved lands for development that is typically automobile oriented. They argued that a culture of separation and specialization in the planning profession made it hard to bring about change. Planners also tend to try to separate plans and outcomes, which play into the separation of uses that inherently destroy plan implementation. To them, conventional zoning “encourages development through separation and dispersion, by disassembling the elements of daily life. Traditional neighborhood development or even mixed use is permitted in very few areas and only under negotiated agreements.” (Duany, Talen 2001).
2.2 Types of Form Based Codes

From the success of the new urbanism model developments, planners began to attempt to codify good design. The ethos being that the form of the building is more important than its function. New urbanists found that historically existing buildings built prior to World War II have hosted a whole number of uses but their form did not change because it did not need to change. Therefore; they espouse that form should be considered over function. Although many of the early New Urbanism projects were developed under PUD’s planning officials looked for ways to allow for ways zoning could permit new urbanism by right. “In the negotiation that ensues between a new urbanist developer and a local government, the local government is often reluctant to vary from the conventional standards for street width, lot, size and type of dwelling permitted,” (Sitkowski 2003). New Urbanists began to develop ways to incorporate elements of the New Urbanism ethos into conventional zoning codes by focusing on the elements of good urban form in the existing regulatory framework.

Most form-based codes are influenced by the concept of Traditional Neighborhood Design (TND) which was developed by Clarence Perry an architect who in the 1920’s proposed the concept for locating schools and other services within walking distance of residences (Duany 2000). Perry’s concept of the neighborhood unit influenced the concept of TND which defined land development patterns prior to World War II (Duany 2000). Municipalities often adopt the TND as a design overlay district to their existing zones. Some codes focus on architectural and design features more heavily than others. Others offer incentives for using the optional overlay including density bonuses, and other exemptions.

These codes were appealing to historic city cores that had an abundance of the elements supported in New Urbanism such as mixed-uses, street grids and buildings that front directly on
the street. Additionally, suburban style zoning codes forced many areas of these older communities to become non-conforming and permitted new developments that were geared towards the automobile. The codes also became appealing to suburban and fringe municipalities that were looking for ways to create a sense of place in the suburbs, (Sitkowski 2003).

In the early 2000’s the Congress for the New Urbanism created a model form-based code called the SmartCode in order to provide a standard, legally defensible code for local governments. One of the core principles developed by the leaders of New Urbanism and a central part of the SmartCode was the concept of the transect. The transect, developed by Sir Patrick Geddes, is based on a system that described the scale of natural landscapes. Geddes had based the original transect on the natural order of environments from bodies of water to prairies to dense forests. This order of landscapes could also be translated to interpret the varying intensities of human habitation. Andrés Duany applied this same thinking to the concept in the development of form-based code model ordinance. He developed a rural to urban transect that spanned untouched wilderness to rural, suburban to urban and downtowns. Duany postulated that the transect could be designed to cover all aspects of the developed environment (Duany, Talen 2002).

The SmartCode integrated three elements of land use that have been traditionally layered or segregated from an implementation standpoint. These elements are the local governments zoning regulations, design review guidelines and sub-division regulations. The SmartCode can be calibrated to the communities’ desires through a charrette, which is a community driven process where planners and community members come together to develop a shared vision of the future of the community (Duany, Talen 2001).
The SmartCode functions as a zoning regulation by providing setbacks, height restrictions, determining off-street parking requirements and uses in certain transect zones. The established uses are usually more flexible than use definitions under the Euclidean model and integrated into the parking requirements. It also utilizes a regulating plan that is intended to replace a zoning map but often is regulated as one due to the constraints of state enabling legislation, that shows the different transect zones, civic spaces, A and B street designations, and mandatory retail frontage areas (Duany, Talen 2001).

The SmartCode can perform as a sub-division regulation when it designates the types of vehicle corridors for development or redevelopment (Duany 2009). Traditional sub-division regulations are based on standard traffic engineering and road building practices. They "prescribe patterns of collectors and arterials to force drivers along a limited number of thoroughfares," (Duany 2009). The SmartCode provides illustrations with predetermined street lengths and calculations for pedestrian crossing and vehicle lane widths. Streets in the model code are designed to be narrower and with sharper curb radius's to discourage speeding, which in turn encourages a pedestrian atmosphere (Duany 2009)

Finally, the SmartCode can serve as a design regulation. Many communities lack a Design Review Board and Design Review Guidelines. Others have a design review board serve as only an advisory board that makes recommendations on projects but lack any real enforcement. The SmartCode, codified these regulations and make them enforceable by law. It provides options for the types of building facades, streetlights, street trees and signage that a community allows for the given transect zone. (Duany 2009) These details are once again configured to be community specific by involving the community participation from the bottom-up.
2.3 Legislating the New Urbanism (Reforming State Enabling Legislation)

Almost all states in the United States have adopted some form of zoning enabling legislation, a majority of which are based on the 1926 Standard State Zoning Enabling Act. The SSZEA includes two parts, a “Grant of Powers” and the “Purpose in View” provisions. Surprisingly, form-based codes are easily supported under this basic regulation. The SSZEA even goes so far as to say, “Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the municipality,” (Sitkowski 2002). Despite these findings some states have moved forward in adopting reformed zoning legislation in order to allow or encourage the adoption of form-based code ordinances on a local level.

The first comprehensive reform of state enabling legislature occurred in 2000 when Pennsylvania Governor Tom Ridge signed into law Act 68. The act was based on the principles laid out in Andrés Duany’s book Suburban Nation. Although form-based codes could have been enacted under the state’s zoning legislation many municipalities were apprehensive towards embracing form-based codes because of the risk. After the state adopted more progressive reforms under the Act, municipalities found it easier to adopt form-based codes because of the support from state legislatures. As Sitkowski & Ohm illustrate in “Enabling the New Urbanism,” “Municipalities that enact TND regulations can apply them to development, as an outgrowth of existing development, as a form of urban infill, or combination or variation of these forms of development,” (Sitkowski 2002).
In Wisconsin, a 1999 law mandated that municipalities with a minimum population of 12,500 adopt a TND ordinance. The law, Wisconsin Act 9 defined traditional neighborhood development as, “a compact, mixed use neighborhood where residential, commercial and civic buildings are within close proximity to each other,” (Sitkowski 2002). This requirement affected about sixty cities in the state yet there are no penalties if a municipality doesn’t comply, (Sitkowski 2002). Municipalities have the option of adopting the provision under traditional zoning, an overlay, a floating zone or as a modified PUD (Sitkowski 2002).

The mandate in Wisconsin has done two things. One is that a model ordinance was drafted for adoption by municipalities by the University of Wisconsin Extension. Two, the approach was not based on the premise that the state enabling legislation failed to allow for traditional neighborhoods; instead it was an effort to ensure that local zoning and subdivision ordinances did not act further to prevent traditional neighborhoods from being built. (Sitkowski 2002). The findings from the states that adopted traditional neighborhood reforms show that state enabling legislation did not prevent the adoption of form-based codes but in cases where state enabling legislation had been reformed, it improved the likelihood of local government buy-in for new urbanist codes such as the form-based code. Similar legislation had been adopted in Florida and in New England area states and the results seem to mirror the legislative successes from both Wisconsin and Pennsylvania (Lawlor 2011). Florida in particular is most crucial since it is the birthplace of new urbanist development (Goldstein 2006).

**2.4 Methods of Implementation**

Standard Zoning Enabling Legislation are the rules and regulations for each state that governs the ability for municipalities to enact zoning laws but they pose challenges when when it comes to applying a form based code. However; many form-based codes are enacted under the
same state legislation that enables conventional zoning. Few states have adopted smart-growth legislation allowing for easier implementation of form-based codes but even in states where the SSZEA is the only method for implementation; form-based model ordinances such as the SmartCode only need a few modifications to comply with state statutes.

There have been over three hundred SmartCode based form-based codes adopted worldwide (SmartCodeComplete.com) with a significant majority adopted within the United States. Many other municipalities have adopted similar form-based codes such as Louisville, Columbus and Nashville. These cities have adopted Form-districts based on the SmartCode, or revised their entire Zoning Code to a form-based code. Other SmartCode communities include Miami, Florida; El Paso, Texas; Lawrence, Kansas and Pentaluma, California among others. There have been plenty of other form-based codes not based on the model ordinance provided by Duany & Plater-Zybek including codes in Louisville, Lexington and in Northern Kentucky. These codes act as a combination of more traditional Euclidean zoning with design standards for new construction integrated into the code. In the United States, the most comprehensive example has been the adoption of the Miami 21 form-based code in Miami Florida. Other examples of cities that have replaced their entire zoning and sub-division regulations with a form-based code include Leander TX and Abbeville LA.

Miami 21 was the first comprehensive implementation of the SmartCode in a major American city. The code was adopted in 2010 after significant public input, political challenges and legal speculation. Like the SmartCode, different areas of the city were divided into transect zones however; the transect is further sub-divided for different neighborhoods and context specific sections of the city. For example, instead of just T5 there are also T5.1 and T5.2 zones.
This allowed for greater variation in the way the form-based code is applied in a more complex and larger scale urban environment.

Given that enabling legislation in the United States generally supports the creation of form-based code ordinances that regulate form over function there are several different ways for municipalities to implement a form-based code. One is to replace the entire zoning ordinance and zoning map with a form-based code and regulating plan for part of or all of a municipality. Another would be to adopt the form-based code as a parallel code that is optional (Barry 2008).

In general adopting a mandatory form-based code ensures cohesiveness over large land areas. Additionally, mandatory codes are effective along business corridors. One example is in Petaluma, California where the city rezoned over four hundred acres of their downtown infill areas in 2003. The rezoning of downtown yielded immediate development where efforts to redevelop had languished under traditional zoning for over twenty years. (Barry 2008). However; success of mandatory code adoption is not assured. Fort Meyers, Florida also adopted a mandatory implementation of their form-based code yet the code has met criticism due to its implementation only in small pockets of the city.

Mandatory adoption also prevented low density sprawl development and made better use of limited land assets in the adopted jurisdictions. For municipalities that are not land constrained, a mandatory code can dictate more harmonious greenfield development. Leander Texas, a municipality that replaced its entire conventional zoning code with a form-based code has targeted over two-thousand acres for new transit oriented development with the recent connection to the regional Austin commuter rail line (Barry 2008). The city-wide code was possible because the small number of developers who owned the majority of developable land shared a common vision for the future of their properties and the city. Cities that adopt a
mandatory code should study how the form-based code can affect or integrate with existing development. Sonoma California developed thirteen planning areas each focused on integrating new development and upgrading non-conforming buildings to conform over time to the new mandatory code. Both cities are examples where political will and planning analysis led to the mandatory adoption of the code. Thus, where it is politically feasible, mandatory codes should be pursued and implemented (Barry 2008).

When comparing successes of mandatory implementation versus the optional overlay zones it has generally been found that the mandatory zone change is the most impactful and successful of the two options. However; optional overlays have the ability of being implemented if there are certain political or logistical concerns (Barry 2008).

Optional overlay implementation seems to be more appealing to municipalities that may have difficulty in adopting the mandatory implementation by political concerns raised from the nature of form-based codes. Citizens that prefer suburban areas tend to oppose the higher-density development permitted in many form-based codes which could greatly hamper efforts to adopt codes in suburban areas that may sorely need it (Barry 2008) (Dunham-Jones 2010). Another frequent fear of adopting a mandatory form-based code is that the new code would require an overhaul of the existing zoning, causing recently approved developments to go through the approval process again. Both of these fears are without merit. Form-based codes can permit suburban style development in the form of special districts and projects approved under the prior code have to be allowed to continue under the regulations they were approved under (Barry 2008).

The takings clause in the Fifth Amendment has been cited in several communities as an impediment to implementation of mandatory codes. This concern persuaded Arlington County
Virginia to pursue their form-based code as an optional overlay for the Columbia Pike corridor. The takings clause has been consistently found to not be an obstacle in the adoption of mandatory form-based codes. The Supreme Court even endorses land regulations to control sprawl in the court case Agins v. City of Tiburon where the court stated that, “the use of land use regulations that control sprawl emphasizing that it is legitimate ‘for local governments to discourage “the premature and unnecessary conversion of open-space land to urban uses.’”” (Barry 2008). Nevertheless these misguided perceptions of form-based codes influence many municipalities to choose adopting the code as an optional overlay.

There are a several ways to pursue optional implementation. One option is adopting a parallel code which would serve as an overlay. For example, the Columbia Pike code serves as an overlay that is mapped with a regulating plan. The other is adopting a floating zone that would not be mapped but instead allow properties city-wide to opt-in. Development created under the floating zone are not necessarily developed on an existing form-based code regulating plan but utilize the municipalities existing form-based code regulations.

Optional codes must also be incentivized to work, whereas adopting just an optional code does not give a developer enough incentive to utilize the alternative code if it the existing zoning is more beneficial. In the Columbia Pike example, developers were attracted to the form-based codes predictability which showed that new development conformed to the county’s vision. Other incentives include reduced architectural fees, an accelerated application phase and development bonuses (Barry 2008).

2.5 Legal challenges to elements of form based codes

A thorough review of case law presently shows that the SmartCode and other form-based codes have not yet been tested in court. However; despite the lack of cases, the basic principles
behind a form-based code, the ability to govern the design and form of development over use, has been challenged in several instances and provide some defense and some vulnerabilities to adopting these types of codes. Although some aspects of the form-based codes such as the mixing of uses and municipal intent have been upheld by the courts, the greatest vulnerabilities to land use regulations typically can be broken down into four categories, takings, vagueness, substantive due process and procedural due process.

One case that upheld traditional neighborhood style development is the court case Restigouche v. Town of Jupiter which was a 1995 case decided by the 11th Circuit Court of Appeals. In the case, the town of Jupiter prohibited car dealerships as a permitted use because the town was interested in preserving the Indiantown Road corridor as a walkable traditional downtown. The court noted that, “The Town asserts that the Comprehensive Plan and IOZ Regulations reflect its concern with preserving and establishing an aesthetically-pleasing corridor along Indiantown Road, and its goal of creating an identifiable, traditional downtown. It is well settled that the maintenance of community aesthetics is a legitimate government purpose,” (White 2009).

White further notes that the idea of walkable communities is not a new idea to zoning. In 1927, Salt Lake City’s original zoning districts had a residential zoning district that permitted corner stores. In 1943, this exemption was challenged because an adjoining property owner considered the neighboring commercial use a nuisance and the zoning district as spot zoning. In rejecting the central argument on spot zoning the Utah Supreme Court stated, “Here the general zoning plan of the city was set within a reasonable walking distance of all homes in Residential ‘A’ districts the possibilities of such homes securing daily family conveniences and necessities…To effectuate this objective, there was created, on a definite, unified plan, at the
intersections of definite fixed through streets, these small residential utility districts, limited and confined to such uses,” (White 2009).

Takings

Traditionally, the most central challenge to land use regulations is regulatory takings. Takings has its roots in the 5th amendment to the U.S. Constitution which prohibits government entities from taking a property, usually through eminent domain, without just compensation to the property owner (U.S. Constitution 1787). In regulatory terms, the regulations have to be so restrictive as to be comparable to the act of eminent domain. Takings challenges typically occur when a property owner sues on the grounds that the regulations have “taken” the potential usage of his or her property and rendered the property valueless. For example, in Euclid v. Ambler Realty, the property owner sued the city on a takings ground stating that the zoning code unfairly restricted the use of their property. The court upheld the zoning code because it was implemented as a protection of the public’s health, safety and welfare.

One of the key aspects of legal defensibility for form-based codes is that they must be defensible against takings claims. The court case of Dallen v. Kansasa City, which is greater described under the vagueness section, established the ruling that design overlay restrictions over the conventional zoning was a taking against the appellant because there was no established recourse for the mandate. Form-based codes that mandate mixed-use have the obvious potential of being challenged as a legal takings case. Additionally, the nature of the taking could be diverse where a court could rule the regulation deprives the economic use of a property (through Lucas), a physical or categorical taking (Jourdin, Garvin 2008).

The most significant takings challenge to form-based codes would be in the findings of the court case J.D. Construction v. Board of Adjustments. The case, involved a zoning regulation
that prohibited front parking spaces for multi-family apartment developments in single-family residential districts was struck down by the New Jersey Supreme Court on grounds of vagueness and no reasonable relationship to the zoning ordinance. The court stated, “While the restrictions may bear a reasonable relationship to such a purpose as applied to single-family residences in a single-family residential zoning district, it bears no such relationship as applied to garden apartment complexes in which apartment buildings and parking facilities are frequently arranged at various angles and positions in relation to the property’s ‘frontage’ on a public street,” (White 2009). Form-based codes typically require parking to locate either in side or rear yards and frequently reduce or eliminate parking requirements. This court case is the primary reason New Jersey does not support aesthetic zoning. In response to this challenge however; White assures that municipalities are sufficiently protected when regulating parking in general through court cases State v. Rush (Me. 1974) and Parking Ass’n of Georgia, Inc v. City of Atlanta (Ga. 1994) which both establish that municipalities have no constitutional right to provide parking and that reasonable parking restrictions can be upheld against takings challenges, (White 2009).

The last takings case is a 1987 case involving the City of North Miami which ruled that local governments could not include minimum height requirements in their codes as they were overly restrictive and, “had no relation on a communities health, safety and welfare,” (White 2009). White recommends that jurisdictions that wish to use minimum height standards do so only after making careful findings. The use of graphics was also suggested to help clarify such regulations. After the court case, Florida updated their state planning legislation, which now allows for minimum height restrictions. This is another case where state-enabling legislation has helped increase the effectiveness of form-based codes.

Vagueness
Land use codes sometimes have parts that are poorly written and therefore can be defined differently be different parties. This type of challenge is known as a vagueness challenge and is an instance where regulations and laws lack the clarity to properly be implemented. When a law uses terms that are undefined or not well defined it can open up a vagueness challenge which could invalidate all or parts of the law, depending on how the court rules on the applicability of the term, phrase or word in question.

Where vagueness can occur is in two different areas, either the definition of the process or item or the lack thereof a definition. Jourdan and Garvin argue that although many form-based codes, including the SmartCode rely on commonly held definitions for most terms, it is recommended that if there is an opportunity for confusion by not defining something it would be better to define it instead. New Urbanists should be cautious however; the extensive usage of legal definitions for conventional zoning is also one of the factors that constrain Euclidian zoning and limit its effectiveness (Jourdon, Garvin 2008).

One challenge has arisen with the idea of build-to lines that are inherent in many form-based codes, including the SmartCode. The court case Dallen v. KC (Dallen v. City of Kansas City 822 S.W.2d 429 (1991)) actually challenges a municipality’s right to establish mandatory standards for street frontage. In the case, the applicant owned a gas station and car wash but challenged the legitimacy of a design overlay that required the building to front the street and prohibited parking in the front. The ordinance was found invalid on vagueness grounds in addition to being overly restrictive to the point where it could have been construed as a taking. White describes how this case served as a word of caution to form-based code adopters, “First, if the standards are mandatory, the local government may consider exempting uses that cannot conform to them—or not allowing those uses at all in the underlying district. Second, the
regulations should be internally consistent, providing a clear message throughout the ordinance as to what is permitted and what is not permitted. Finally, a good set of legislative findings should accompany the regulations that demonstrate why they are needed and ruling on their economic viability and marketability,” (White 2009).

Finally, vagueness can be applied to regulations governing architectural design. As shown in a 1993 case, Anderson v. Issaquah that was decided by the Washington state appeal court. The court struck down the city’s design regulations on vagueness grounds. The court stated that, “in the field of regulatory statues governing business activities, statutes which employ technical words which are commonly understood within an industry, or which employ words with a well-settled common law meaning generally will be sustained against a charge of vagueness…The vagueness test does not require a statute to meet impossible standards of specificity,” (White 2009). White concludes that most form-based codes are wise not to act too much as architecture design guidelines and make a substantial effort not to address different architecture styles outside of building form. Additionally, design codes must avoid using language that is not definable by common law (Jourdan, Garvin 2008).

**Substantive Due Process**

Substantive due process challenges are related to vagueness challenges but occur in the instance where the appellant believes the regulations have exceeded the government’s authority. Due process is ensured under both the fifth and fourteenth amendments to the U.S. Constitution. The Fifth Amendment ensures, “No person shall…be deprived of life, liberty, or property without due process of law;” (U.S. Constitution 1787). The fourteenth amendment further applies this language to the states and since local jurisdictions are technically state entities, they must also adhere to due process rules.
Substantive due process challenges on vagueness grounds have been argued before the courts in relation to the legality of certain aspects of architectural design regulations. In Village of Hudson v. Albrecht, Inc. the appellant challenged the wording of the villages design regulation which included the word “harmonious.” In their decision, the court upheld the design regulations language citing that other language in the design code helped clarify the word harmonious in relation to integration with vehicular traffic patterns (Jourdan, Garvin 2008).

From Village of Hudson v. Albrecht, Inc. and the Anderson v. City of Issaquah cases which was previously mentioned, it appears courts have generally held design regulations to two standards under substantive due process. On one account ordinances can be invalidated on vagueness grounds or upheld if the definition is found elsewhere including case law. This is further highlighted in City of Mobile v. Weinacker that invalidated an ordinance mandating modern architecture on vagueness grounds, and State v. Weiland that upheld an ordinance after referencing definitions from other states. (Jourdan, Gavin 2008).

**Procedural Due Process**

The second due process concern is procedural due process. Unlike substantive due process that looks at whether or not the governing authority has enacted regulations that exceed its ability to enforce, procedural due process deals with whether a government body is addressing the issue under a proper procedure and that affected populations have the ability for a proper recourse. Like substantive due process, these regulations apply to the state and local levels through the fourteenth amendment.

There are few court cases relating to zoning codes and procedural due process. One in particular, Kenville Realty Corp v. Board of Zoning Appeals found that the, “court must attempt to strike a balance between ‘straight-jacketing’ public officials and ensuring rule of law rather
than caprice.” (Jourdan Garvin 2008). However; there are some areas in form-based codes that are open to potential legal challenges on procedural due process grounds.

Whereas zoning ordinances tend to be specific regarding structures and uses, form-based codes tend to act more as design guidelines that are intended to be more flexible in their enforcement and interpretation. Many form-based codes, including the model SmartCode give local government officials more power and discretion in approving or rejecting proposals under the codes regulating plan. Jourdan and Garvin warn, “too much discretionary power may be vested in the hands of decision makers who have very limited working knowledge of the architectural, urban design, or planning principles upon which these ordinances are derived,” (Jourdan, Garvin 2008). These constraints seem to be acknowledged by the principles behind developing form-based codes where applications are recommended to be handled by a Consolidated Review Committee (Duany 2009) or contracted out to an architect (Parolek 2008). However the discretionary review processes proposed in many codes have yet to be tested in the legal system.

Another procedural concern is not within an adopted regulation per se, but instead in the ability of neighboring property owners to have referendum voting on zoning issues. Sitkowski and Ohm provide describe this situation in their review of I’On, LLC v. Town of Mt. Pleasant. The 2000 court case involved a new urbanist type development that featured mixed-uses and pedestrian friendly street frontages however the plan was being implemented through a Planned Unit Development zoning change. After initially being rejected by the city, the developer reconfigured the plan, which subsequently passed. Throughout the process, neighbors protested the development and attempted to pass a referendum that would have rejected the zone change.
The South Carolina State Supreme Court struck down the referendum stating that regulating land use by referendum was illegal (Barry 2008).

2.6 Conclusion

Although there have been no direct challenges to an adopted form-based code, there still remain legal pitfalls in the adoption of new regulations based on the key aspects of form based code, primarily the placement of buildings in relation to parking and specific design requirements. Adoption of these regulations seem to be easiest in states that have reformed zoning legislation to allow for coding that preserves the ideas espoused by New Urbanism. These communities based on New Urbanism seek to emulate a development pattern abandoned by Euclidean zoning but have become desirable again through their own accord. The intent of regulations such as the SmartCode is to make building good form easier without the encumbrance of Euclidean zoning. Form-based codes not based on the SmartCode template may run the biggest risk of being challenged as the core of the SmartCode seems to acknowledge the previously reviewed case law. The challenge moving forward is to now review the options Bellevue, Kentucky has in furthering the adoption of its next phase of form-based code.
Chapter 3: Case Background

What follows below is a general summarization of the development and implementation of a form based code for the city of Bellevue. The information contained within is mostly from firsthand accounts from my own experience and in conversations with staff, the community, consultants, politicians, and other people involved in the process and development of the code.

About the City of Bellevue

The city of Bellevue, KY is a fourth class city in the Commonwealth of Kentucky. As of 2010, the city had a population of 5,955 (Census 2010). The city is located along the Ohio River within one mile of downtown Cincinnati. It is constrained from expansion with Newport to the west and southwest, Dayton to the east and Ft. Thomas and Woodlawn to the southeast. Bellevue is roughly one square mile in size.

The city has a Mayor-Council form of government where the Mayor runs the administration through the City Administrator and city staff and Council handles the legislative priorities. The City Administrator oversees the various departments of the city’s organization which are the Clerk/Treasurer, Police, Fire, Code Enforcement, Zoning, Economic Development and Public Services Departments. Because of the city’s size, there is no need or funding for a large staff. City staff consists of twenty-two employees not including the Mayor and City Council; this means staff is tasked with multiple responsibilities outside of their job title.

3.1 Developing the form based code

Visioning

The development of the city’s form based code was the culmination of a five-year process beginning with the redevelopment of the city’s Comprehensive Plan, calibration through a charrette process, adoption and implementation. Throughout the process, the city experienced
population decline, a revitalization of its historic business district and the effects of the recession in the late 2000’s.

In 2006 the city began to update its Comprehensive Plan. The plan had not been updated since 2000 and was required to be updated or reviewed and renewed every five years. The previous plan had outdated information as it was missing the newer census information from 2000. Since Bellevue had not performed the update, it was possible for future developments or revisions to the zoning map to be held up in court due to an outdated plan.

City staff coordinated the update with the Northern Kentucky Area Development District (NKADD). The first step was to review and revise the Goals and Objectives section of the plan. Then the newer information would be integrated into the remaining plan and adopted by Planning and Zoning Commission and City Council. The revisions were coordinated and revised under a sub-committee that was made up of Bellevue residents, business owners, Planning and Zoning Commissioners and staff. During the review sub-committee members found that the opportunity existed to revise some of the goals and objectives. Specifically the sub-committee was interested in the possible implementation of a form-based code. The language was added as an objective of the Comprehensive Plan and passed out of sub-committee, Planning and Zoning Commission and Council to become part of the 2008 Comprehensive Plan update.

The interest however was developed about a year before the Comprehensive Plan was adopted. City staff had been working on identifying areas of the city to designate for redevelopment in a presentation for Developers Day, an even coordinated by Southbank Partners where Northern Kentucky cities pitched sites to interested developers on a boat tour along the Ohio River. The city had designated three areas for redevelopment, the riverfront, an old trailer park at the southeastern end of the city and an antiquated shopping plaza district located along
Donnermeyer Drive and Riveria Road. At the event city officials were introduced to Jeff Raser from Glaserworks LLC who expressed interest in using form-based code elements in a possible redevelopment of the shopping center area in Bellevue.

After the event staff began to work with Jeff Raser on developing a vision for the future of the shopping center site. The city advertised the shopping plaza because out of all the development in the city, the shopping plaza had mostly dated auto-oriented suburban development, which was largely out of character with the city’s dense historic urban fabric. Even though Bellevue had a plethora of this type of development it would have been hard to redevelop the shopping plaza as a contextual neighborhood under the current code. Additionally, the possibility of an Interstate highway exit being located next to the shopping plaza meant that a redevelopment plan needed to be in place within a reasonable amount of time to prevent the area from being dominated by automobile driven development.

The end result was an internal charrette design from the architects at Glaserworks that was presented to the mayor and some city staff. The vision included dividing the large area of the shopping plaza with new streets and replacing the large footprint of the old shopping plaza with multi-story mixed-use development. Buildings were scaled in height to around five stories in order to block views to Interstate 471. This was done to limit the negative visual impact a highway could have on a redevelopment area. Conversely, buildings along the highway were heightened to be visible along the highway, thus serving a dual purpose sheltering the community from the visual impact of the highway and elevating the visibility of the area from the highway.

After the development of the initial plan, the city began the process of educating elected and appointed officials on the form based code and touting its benefits for the future of the city.
This included a presentation by Mr. Raser to the city’s Planning and Zoning Commission in early 2009 as well as the participation of several council members in a day long trip to Columbus with the Cincinnati based, Form Based Code Institute.

By 2009, the city began to consider including the riverfront as an additional area that could be regulated under a form based code. Although the existing development being constructed along the river at the time brought in high-income residents and some commercial retail components, city officials observed that the new developments failed to mesh with the organic, historic and walkable areas of the city. Additionally there was a wide body of research pointing towards development trends that were moving towards walkable, dense neighborhoods based on traditional neighborhood structure, development that Bellevue had an historical abundance of.

For the next phase, Jeff connected city staff with Placemakers LLC, one of the leading companies on calibrating and developing the SmartCode. As mentioned previously, the SmartCode is a model form based code developed by Duany-Plater Zyberk & Company, which are considered by many to be among the founders of New Urbanism. Other communities in Northern Kentucky had developed form based codes under the guidance of the Northern Kentucky Area Planning Commission such as Fort Mitchell and Covington but their codes placed more emphasis on architectural requirements and lacked the practicality that the SmartCode offers. After staff reviewed their proposal the city decided that Placemakers was the right company to work with on developing the new code.

After several months’ city staff had gathered the support from City Council on the proposal and the city hired Placemakers LLC in December 2009. From there the staff and consulting team began to lay the ground work for introducing form based code concepts to the
residents, organize a media and public relations blitz, develop maps, and conduct a survey of what citizens thought were great places. Because of the expanded scope, the consultants recommended that a four day charrette was sufficient for developing the code. The charrette was scheduled for late March in Bellevue and Placemakers representatives Susan Henderson and Geoff Dryer would fly in to conduct the meetings in Bellevue.

3.2 Calibrating the code

The city’s first step in disseminating information to the residents was the “What is a Form Based Code?” informational session. Jeff Raser presented information to an audience on the basics of a form based code at an evening session held at the end of January 2010. The city sent invites to everyone that lived in the areas that would eventually be rezoned for the form-based code (the riverfront and the shopping center planning areas). The session was heavily advertised in the Bellevue Community News, the Northern Kentucky Enquirer and on the city’s main event board. Placemakers launched a website www.codingbellevueky.org to facilitate online discussion of the process.

The “What is a Form Based Code?” presentation drew about eighty people including residents, elected officials and Planning and Zoning Commission members. The presentation generated concern among residents as to what the new type of zoning would bring. Additionally, some residents expressed disbelief in the willingness of the city to take public input in the creation of the plan. These comments helped city staff and consultants for what challenges they would face in generating buy-in from the community.

The purpose of the next meeting, held in mid-February, was to conduct a survey to participants on the types of places they would prefer to live, shop and relax at. Jeff Raser and city staff compiled pictures of various places from around the area. It was important that none of the
pictures came from Bellevue to prevent participants from associating certain places with their own viewpoints and experiences of an area that they were already familiar with. For example, a picture of Hyde Park in Cincinnati was used, but it was taken from a location that made it hard to tell where it was. This would help limit the amount of bias in the results. For the second part of the survey, participants were presented two large maps of the riverfront and the shopping plaza areas and asked them to write what they thought about the area or suggest what things can be done to improve the areas we presented.

Over forty people participated at the survey session. After two weeks, Jeff had tabulated the results of the Visualization Survey for use in the charrette. Staff began to generate the required GIS maps that we would need to develop the transect zones and new roads in the two planning areas. Maps needed to include roads, topography, and building outlines for both areas. Jody coordinated room and board for the consultants and invited regional leaders, local politicians, business owners, and utility representatives to their respective meetings in the charrette.

Additionally, staff identified three areas in the Cincinnati area that the city should emulate with the code for the synoptic survey. In order to conduct the survey city representatives were sent to measure streets, curbs, lengths of sidewalk, building heights; tree planting patterns, and locate overhead utilities in each specific area. City staff and the consultant team measured Hyde Park Square, Ludlow Avenue and the Licking River Historic District in Covington.

Susan and Geoff, consultants with Placemakers LLC arrived the Sunday prior to the charrette to begin preparations for the four day event. The next day consultants and city staff met with city officials, members of the city’s neighborhood association, the city engineer and other department heads and toured the synoptic survey locations. Then over the course of two days the
team conducted a series of meetings with city officials, residents, local business owners, regional leaders, local politicians and utility companies. These meetings were designed to review the results of the visualization survey, gain community input on the proposed code and to also address concerns about specific issues such as traffic, mixing residential uses with commercial, parking and pedestrian connectivity.

By the third day of the charrette, Geoff who was working on illustrations for the code had drawn some concept ideas for a problem intersection in the city, Rt. 8 (Fairfield Avenue) and Riviera. This would lead into the creation of final drawings that illustrated what the two planning areas would look like if they were redeveloped under the proposed code. These illustrations along with input from the community and city staff helped guide the future regulating plan which would include the transect zones as well as new streets and blocks under the form based code.

By Thursday night the coding team was ready to unveil the new code, regulating plan and illustrative plan to the community. After a brief presentation, the public was invited to look at the posted drawings, ask questions and give feedback on the results of the charrette. The plans were well received and generated increased interest from some property owners who were interested in redevelopment under the new code. Several property owners even requested to add their own properties to the planning area due to these interests including the owners of the Party Source.

3.3 Implementation

After the unveiling of the plan, staff began the task of revising the the draft form based code document to meet the standards of state enabling legislation and integrate it into the existing zoning code. This was the first form based code that was based on the SmartCode in the state. Staff was tasked to implement the code as part of the existing zoning regulations and apply the new regulating plan as new zones through the map amendment process. The city hired a
specialist, land use attorney Paul Whitty, to assist with reviewing the code.

Mr. Whitty recommended changes to the code regarding clarification of definitions as well as ensuring that the new codes followed existing protocols and procedures. His focus on ensuring there were more definitions in the code was contested by city staff at the time. Staff was concerned that defining too many terms would constrain the new codes flexibility. After reaching consensus, city staff prepared to bring the code and map amendments before the Planning and Zoning Commission to begin adoption.

According to Kentucky statute, notices for a zone change must be sent out at least thirty days prior to the Planning and Zoning Commission meeting. The city sent over 380 mailings to affected property owners in the city. Most of the calls generated from the rezoning mailing were from citizens that did not understand what the zone change was, or even what zone they were in. Rumors began circulating that the City was going to take land and build a shopping center. These rumors were false but persisted based on some people’s misunderstandings of local government and their lack of understanding the zone change process.

The most troubling problems did not stem from a false rumor but instead from concern from people along the riverfront. During the charrette, the coding team coded the riverfront as civic space in anticipation of the Riverfront Commons project. Riverfront Commons is a regional multi-modal trail that will connect Ludlow to Ft. Thomas along the riverfront. At the time the project was still in its feasibility stage and was years away from being constructed, but the zone change request was enough to upset the property owners along the riverfront. Attorneys representing some of the property owners began to inquire about the zone change. They asked what would be allowed in the new zones and if zoning civic space was taking away value to the property owners land. The city ultimately decided to back off on the civic zoning in order to get
the support needed to pass the code.

The Planning and Zoning Commission met on October 28, 2010. Over sixty people from the community attended the crowded meeting room. Susan and Jeff Raser were on hand to answer any questions as well as city staff. After the Commission heard staff’s presentation on the code, one of the Commissioners, a lawyer by trade, raised doubts about the code. Enough doubts were raised to pressure the rest of the Commission into tabling the issue and sending the draft code to a sub-committee for further review. The sub-committee was made up of two Commission members, and several city staff members.

The turn of events proved to be a disappointing setback but did not derail the code. The Planning and Zoning Commission expressed support for the code but asked for more time to understand the code and recommend changes to the draft code that would make it a better fit into the zoning code. The biggest concern raised at the sub-committee meetings was the lack of Planning and Zoning Commission involvement after the passage of the code. The proposed form based code would become the development law of the zones it affects and allows mixed use development by right, which meant a multi-family building with retail frontage can be built bypassing the traditional need for Planning and Zoning Commission and City Council approval. As a compromise staff proposed that plan applications are submitted to the Planning and Zoning Commission for variances and conditional uses as opposed to the Board of Adjustments.

Following the several weeks of changes, Planning and Zoning Commission agreed to review the code again on November 29, 2010 where it passed with a unanimous vote. The next step sent the code to City Council where the outgoing council and Mayor held two meetings, one as the regular meeting and the second being a special meeting to pass the code on the second reading. This was to ensure the legacy of the outgoing Mayor and several council members.
Staff attention turned next to implementing the rezoning map. The map amendment for both planning areas was brought before the Planning and Zoning Commission on January 28, 2011. The map amendment passed with very little attendance from the public and the full support of the Commission. The amendment then went on for adoption by City Council and was implemented on March 9, 2011 after the ordinances second reading.

3.4 Regulating the Code

Within a week of the code’s ultimate adoption, the city faced its first form based code application, an addition to an existing home in the new zone. Permitting language was changed to reflect the new code and whereas setback used to be the main concern, lot coverage replaced it. Staff began to require the need to measure area for certain transect zones for lot coverage.

At present, the traditional Euclidian based zoning is still in effect for most of the city. New development in the transect zones are regulated under the new code, as is anything that is covered in the code such as signage, landscape, and parking requirements. Accessory structures, fences and parking pad setbacks were all still regulated in the existing code. The new code focused of the creation of new construction or expansion of a permitted use. Lots that were formerly non-conforming now could be marketed as conforming lots for housing to be built on. Existing riverfront redevelopment plans became grandfathered unless they were to conform to the new code. But aside from fences and decks it seemed not much had changed in Bellevue. There were however; many larger challenges ahead for the code as delineated below.

McDonalds

In August of 2011, McDonalds Corporation began to talk to city staff about remodeling the current restaurant located in the shopping center area. The remodel would include a second drive-thru order taking facility. Under the previous zoning designation, “Shopping Center” or
SC, the remodel would have only needed a permit to move forward with the changes. Because the area had been rezoned to T5.5 under the form based code, the additional drive-thru was considered a conditional use and had to go through the Board of Adjustments.

During the calibration and implementation process, the sub-committee wanted to ensure that the Planning and Zoning Commission had input on new projects in the form based code areas. Staff inserted language into the code to give the commission say over variances and conditional uses; unfortunately the language was not congruent with state statute, which only allows the Planning and Zoning Commission to decide on conditional uses and variances if they are related to zone changes. Unsure of how to proceed, staff again consulted Paul Whitty, the land use attorney that assisted the city with developing the final code. He suggested that both the Planning and Zoning Commission and the Board of Adjustments review the plan with the Planning and Zoning Commission issuing an advisory opinion and the Board making the final ruling.

Both the Planning and Zoning Commission and the Board of Adjustments met in October to review the conditional use. Staff indicated that the drive-thru expansion would increase auto-dependency on the site and the remodel would decrease interior seating capacity. Both commissions voted in favor of the remodel and the drive-thru expansion despite the concerns of staff.

The incident highlighted the challenges of implementing the code on piecemeal renovations and remodels of current non-conforming structures in the redevelopment area. It also exposed a fault in the strength of a commission to adhere to the letter of the same redevelopment goals it implemented earlier in the year. In these types of situations, the strength of the form
based code is only as strong as the city’s Planning and Zoning Commission and Board of Adjustment.

5/3rd Bank

In October, 2011, 5/3rd Bank approached the city about placing a drive-up ATM at a location in the shopping center area. At the time the city had two 5/3rd bank branches, one on Fairfield Avenue and the other adjacent to the Kroger in the shopping center. The Kroger branch would be eliminated when Kroger proceeds with their store renovation in early 2012. City staff provided the representatives from 5/3rd with the results of the visualization survey and the adopted form based code. Staff emphasized that the new ATM also had to meet the intent of the form code in being pedestrian friendly and stated that a drive-up ATM would be against these goals.

The representatives from 5/3rd returned two weeks later with a proposal for the drive-thru ATM located in the city’s right-of-way along Donnermeyer Drive. They stated that they would lease the site from the city and pay a monthly rental fee. Drawings showed pavers from the sidewalk to the machine, which was facing the drive lane. Staff once again reiterated the intent of the code. At some point during the conversation, the representatives mentioned the city allowing McDonalds to go ahead with their drive-thru expansion as a precedent that they intended to follow. They insisted that the city could regulate the ATM as a “building” and that it adhered to the zoning code. Additionally, staff was receiving pressure to move the plan forward by several city council members.

In early November, 5/3rd submitted their design to the city. City staff performed its due diligence on the matter and found that the zoning code would regulate the ATM as a vending machine, not a building as had previously been thought. The zoning code also prohibited the
machine on city right-of-way. Staff relayed the information to the applicants and explained that they would need to change their application. Instead, the city was accused of preventing the application from coming before a board. After a month, staff sent the application back to the applicants.

In this situation, the zoning code, which operates over the entire form based code district, stopped another attempt to bring an auto-oriented use to a zone that the city intended to redevelop for pedestrian development. The situation unfortunately exposed another limitation with the new code, which was that it was ill equipped to provide a positive direction for conditional auto-oriented uses. City staff research did find text in other form based codes and SmartCodes that would help alleviate this problem and seek to implement those reforms in future code revisions.

**Future Challenges**

With concerns mounting as several businesses in the shopping plaza begin to reinvest in their buildings, time is critically important for marketing the shopping plaza area to developers. A few obstacles remain including the challenge that most of the properties are located within a 100-year floodplain. Other goals include the installation of a streetscape along Donnermeyer Drive that would allow on-street parking, new lighting fixtures, street trees and other traffic calming and street softening features to better accommodate pedestrians in the area.

There are several site development challenges with the shopping plaza site. One challenge is raising the area out of the floodplain. Over 90% of the shopping center area is in the floodplain and many of the buildings were developed before 1972, when the city instituted the FEMA flood insurance program. The other is that the site was developed on top of building
material fill from the massive demolition of structures in Cincinnati for Interstate 75 and Queensgate which means it qualifies as a brownfield site.

3.5 Next steps

The next step would be to attempt to apply the form based code to most of the remaining parts of the city. During the charrette, a regulating map was developed that proposed rezoning over 90% of the city based on the corresponding transect. The transects themselves were based on the neighborhoods in Bellevue and the zoning would allow for more flexibility in improving the older historic housing stock as well as developing infill projects that are more in line with the character of the city’s historic charm. Below are five option alternatives that outline the possible paths towards achieving this goal and the challenges that lie ahead.
Chapter 4: Methodology

Several factors will be measured and calculated to determine the best solution for implementation. These include the factors of time and cost of implementation, the steps required for site development, the contextuality and predictability of development and legal risk. Additionally each possible method of implementation must be evaluated against these criteria. One way to accomplish this is to conduct several scenario tests to explore how these proposals affect development in the city.

4.1 Criteria for Evaluation

Implementability: This category rates the ability of the city to implement the listed implementation option. Factors such as cost, time and staff research go into determining whether the option is a quick implementation or difficult to implement.

Legality: The central argument for pursuing a path forward rests on the crux of whether or not the option is not only feasible but also legal. High scores in this category mean that most of the legal grey area has been cleared up. A low score means either the city is open to a legal challenge or that case law or state enabling statute does not provide adequate guidance on the subject.

Developable: Any of the proposals must enable properties within the different study areas to be developed in a way that conforms to the proposed implementation scenario. High scores in this category mean that the property can easily be developed by a developer. Lower scores mean that a variance may need to be issued or the development is required to go before certain commissions for approval.

Contextual: The critical criteria when being viewed by city officials and residents who expressed in 2010 their preference for redevelopment to mesh with the existing historic character of the city. Development scenarios will be evaluated based on whichever zoning is called for in
the implementation scenarios. High scores will go to development options that produce new developments that integrate into the historic buildings of the city. Lower scores will go to development outcomes that are allowed to become more auto-oriented and less pedestrian friendly.

4.2 Implementation Options

Based on the provided problem and a review of the literature, several options can be considered for Bellevue’s specific situation. The options are identified below:

- Zone Change
- Overlay Zone
- Phased Zoning
- Opt-in Language
- Do Nothing

**Option 1: Zone Change**

Option one would be the most legally defensible option, having procedures that have been set by state enabling statute and regulations in the existing code. Ideally, the process would be divided up into phases with the first phase extending the transect zones of the form based code south to Poplar St. Phase 2 will recode the remaining residential historic district (to Grandview Ave) as well as the Taylor Avenue Business District, a small historic commercial area at Center Street and Taylor Avenue. Phase 3 would record the remaining southern section of the city which is primarily residential from R-1 A,B & C to T3 and T4. The result will place over 80% of the city under the Form Based Code. In this scenario, the Form Based Code could ultimately become more integrated into the official zoning code in order to reduce the confusion brought on by having two parallel codes. It would also allow for greater restrictions on fences,
signage and general nuisance controls that are implied under the current zoning regulations. For this methodology however; a smaller section of the city will be rezoned as a test case to gauge the challenges ahead for a wider rezoning effort. The test will utilize the corresponding transect map developed with the assistance of Placemakers LLC in 2010. This map is located in the appendix. The city will choose from the following three sections to do a complete rezoning.

Section A: The Bellevue Vets and 104 Fairfield Avenue.

The Bellevue Vets, located at 24 Fairfield Avenue are a local veterans association and bar. They own a site behind the bar that is in approximately thirty feet below grade of Fairfield Avenue that is used for recreational purposes. The site had been speculated as development space for over twenty years but the Veterans Association has no desire to sell the land. It is currently zoned Mixed Land Use and is the last parcel to have this zoning designation. The Vets Bar is zoned Neighborhood Commercial-One which is mixed commercial storefronts. The second property is 104 Fairfield Avenue which is across Patchen Avenue from the Vets. The property is the site of a small office building that fronts the street with parking in the rear. For the purpose of this exercise, the land will be rezoned to T5.5.

Section B: Fairfield Avenue Historic District

The Fairfield Avenue Historic District is comprised of all properties along Fairfield Avenue from 200 to 715 Fairfield Avenue. There are approximately 107 properties. The corridor is a mix of historic mixed retail buildings with residential above the storefront and houses. Many historic storefronts do not parallel the street frontage instead angling slightly in the direction of approaching traffic. The proposal will rezone this area to T5 from Neighborhood Commercial-One.

Section C: South side of Retreat Street from Clark Street to Taylor Avenue
The south section of Retreat Street was not rezoned in the initial plan but the remainder of both Berry and Lafayette Ave to the south was rezoned in 2010 to T4. This rezoning would cap off that block. It would affect 28 residential properties and be rezoned from Residential-One H to T4.

Option 2: Overlay Zone

The optional overlay will create a new overlay zone over the existing zoning that would allow property owners to utilize the code without the need for a zone change. The overlay process can be accomplished by using the following method. The city develops a zoning overlay, similar to the Residential Cluster Development (RCD) overlay existing in the city. Whereas the RCD permits denser multi-family residential dwellings, the overlay will directly correspond to the appropriate transect zone designation that was developed during the charrette.

The optional overlay is still considered a map amendment and requires the same necessary notification to property owners that the map amendment would. Additionally it would require a text amendment that would connect the existing zoning to the corresponding transect zone. The area of the city that will be rezoned is the same size as the other option and be implemented under a similar phased system. Once implemented property owners can choose to “opt-in” to the form based code. The optional overlay will function similarly to other optional overlay form based codes. For this test implementation the overlay district will be imposed in the sections outlined in Option 1.

Option 3: Phased Zoning

An alternative method to the Overlay Zoning method is one that utilizes a relatively obscure regulation in the city’s zoning code called Phased Zoning (Section 9.28 of the city’s zoning code). The phased zone is a projection of a future type of development the city wishes to
implement on an area over time but is not supported by the city’s current Comprehensive Plan and other development factors such as access.

This method would require a hearing for the implementation of the phased zoning and after a period of time, an additional hearing for the final zone change. The zone would then be designated as its present zoning with the addition of a “P” to indicate that the zone is intended to change in the future. When the city is ready to rezone, it would then initiate the map amendment process. For this test implementation the phased zoning designation will be imposed in the sections outlined in Option 1.

**Option 4: Opt-in language**

The city can adopt language as part of the Zoning Regulations allowing a property owner to “opt-in” to the regulations of the code. This could be done by defining and allowing “Traditional Neighborhood Design” buildings as either permitted or conditional uses in certain zones. The term will be defined as “new construction or structures that are rehabilitated over 50% of cost that are built in accordance with the alternative transect land use map.” This map would have to be accepted as an extension of the city’s comprehensive plan as a guidance tool by the Planning and Zoning Commission in a formal hearing. However, since the zone is not officially being changed, no notification of individual property owners will be required.

The alternative regulations map extends transect zones into R-1A, B, C, H residential zones and NC-1 and 2 Neighborhood Commercial Zones. The text for TND can be added to each zone in one hearing. Zoning text amendments must be advertised with a legal advertisement. The timeline procedure will be the same as the three map amendment options.

**Method A: Permitted Use** – The TND becomes an option for all structures that are new or significantly modified beyond 50% and wish to use the standards of the city’s form-based code.
Method B: Conditional Use – The TND option becomes an option for all structures that are new or significantly modified beyond 50% however decision on approval is made by the city’s three person Board of Adjustment in a hearing with notification made to neighboring property owners.

Option 5-Do nothing

City staff would continue to utilize the existing zoning map for the city. There would be no map amendment unless a property owner applies to change the zoning to a transect zone. City staff would continue to administrate the form based code in the areas already zoned as transect zones and administer the existing zoning for other areas.

4.3 Development Scenarios

Three different development patterns will be tested against each implementation strategy. Each development area is from within one of the three proposed rezoning sections. Location overview maps of each area included in the appendix of this document. Scenario sites were chosen after reviewing each planning areas vacant space, scenario needs and developable opportunities. Project 1 was selected because it is one of the largest undeveloped spaces in the city, and adjacent to a current redevelopment areas. Project 2 was selected because it was an average lot for the district that was also vacant. Project 3 was selected after it was found there were no vacant lots in the study area. The corner lot was chosen because residents and city staff had expressed concern for corner property redevelopment at the city’s charrette.

Project 1(large lot development) – A developer has acquired the property currently owned by the Bellevue Vets (24 Fairfield Avenue) and the large playing fields at the rear of the property. The playing fields are located in a deep basin that could be prone to flooding if a 100 year flood event were to occur. There are significant grade differences but the grade could also be an opportunity
to allow for a large underground parking structure. The property is in close proximity to Interstate 471.

Project 2 (neighborhood commercial development) – A developer has proposed to rehabilitate a building in the heart of downtown Bellevue at 711 Fairfield and possibly construct a new expansion on the adjacent vacant lot.

Project 3 (residential house development) – A hypothetical disaster befalls a house located at the corner of Lafayette Avenue and Retreat Street (202 Retreat Street) in Bellevue. The disaster however is not covered under the grandfather clause for non-conforming structures and must be rebuilt under the present day zoning. Someone wishing to rebuild a single-family house at that location owns the property.

4.4 Discussion of Elements

Of the five options presented, three of them are zone change options. Of the three, the complete zone change, Option 1, is likely the most legally defensible option since it is a complete zone change done in the manner regulated by KRS 100 with findings that point back to the charrette in 2010. Option 2 could take the longest to implement because of the need to develop overlay zoning code text prior to the implementation of the map amendment. There could be an opportunity to implement the new zone along with the text but given prior challenges to the initial implementation, it would be more feasible to adopt the text for the new zone before adopting the zone change.

Of the choices for Option 1, Option 1A involves the least amount of property but carries some possible controversy since the Veterans Association has no desire to sell the property and the community values the associated baseball fields for recreational use. However the
development potential of the site is enormous if a developer can overcome the constraints of locating in the floodplain.

Option 1B would be the most extensive but it is believed as “the Avenue” goes so does the city. The street would gain the benefits of the code but has little opportunity for infill development. Signage standards would be more restrictive but uses would be more flexible which means the city would not be able to control the types of uses on Fairfield Avenue as strictly. This could be a detriment as over the past six years the city has been attempting to eliminate and keep out commercial uses associated with blight (cell phone stores, pawn shops and video stores). One possible modification would be to define these uses in the form-based code as not-allowable.

Option 1C is would rezone only a small part of a residential block. The main challenge would come from residents who may oppose the rezoning based on rumors the city wants to demolish their properties. This rumor started in 2010 during the initial rezoning and has persisted to today. Additionally there would be political concern as one of the councilmembers believes very strongly in single-family homeownership, something that is mandated under the present zoning but will change under the form-based code which regulates dwelling density by parking spots.

Option 2 will take the longest however it is possible to pass both the text amendment and the map amendment at the same time it would be extremely risky. If the text fails the map amendment would have to be tabled and a new meeting set. Therefore the option has been spread out to ensure time for public scrutiny. Of the options presented this option is the most complex and will take the longest.
Option 3 involves an initial rezoning that does not carry much weight in regulatory terms, the phased zoning designation only signals intent, not any restrictions or standards, and requires a further rezoning after the next adoption of the city’s comprehensive plan which is scheduled in 2013. Because it has the least impact and requires an eventual zone change hearing, it is not recommended but will still be explored for the purposes of this report.

Option 4 is the only option that only involves a text amendment. It is projected to be the easiest to implement in either scenario between Option 4A or 4B. 4A has more risk from a political standpoint because there is no oversight yet 4B grants oversight through a commission but does not favor expedience. The safest choice for the city to implement from this option would be using Option 4B.

Option 5 would continue using the present zoning without text modifications or zoning changes. There is no political pressure to deviate from Option 5 so there is no opposition or call for reform. Option 5 involves the least amount of time, cost, work, and complexity. Option 5 will act as a control group to all other options selected.

Below is a summary table of the scoring of each implementation. Each implementation option will be scored according to the numeric values below and the description under section 4.1.

**Numeric Scoring Schematic**

| Implementable: | 1= not implementable  
|                | 2= very difficult to implement  
|                | 3= difficult to implement  
|                | 4= implementable with few obstacles  
|                | 5= easily implementable  
| Legal: | 1= obviously illegal  
|        | 2= no supporting case law, regulation or prior examples  
|        | 3= some supporting case law, prior examples  
|        | 4= mostly supported by law and examples  

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5 = Legal

**Developable:**
1= Land cannot be developed feasibly
2= There are major regulatory & economic impediments to development
3= There are minor regulatory impediments to development
4= There are some minor issues with development
5= Land is easily developable

**Contextual:**
1= easily found in automobile oriented suburbs
2= Development is auto-centric with small concessions made for walkability.
3= Development appears to fit but exceptions for automobile preference.
4= Building form and scale contextual but could be improved on
5= Similar in form to historic part of city

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Chapter 5: Analysis

5.1 Hypothetical Implementation Scenarios

The following passages explore the hypothetical implementation of each alternative option and sub-option. Each option is explored as a proposal to Bellevue City Council with possible findings of fact and arguments for and against each proposal based on the factors outlined in the methodology. Comparisons of each option shall be made after each implementation is outlined and build-out scenarios have been tested. An overview map of the three areas is located Appendix B.

Option 1 – Zone Change

Applications for the appropriate zone change would be presented to City Council after approval from the Planning and Zoning Commission. Study area A would be rezoned from Mixed-Land Use (MLU) and Neighborhood Commercial- One (NC-1) to Transect Zone 5.5 (T5.5). Study area B, Fairfield Avenue Historic District will be rezoned from Neighborhood Commercial – One with Historic Preservation Overlay (NC-1(HP)) to Transect Zone 5 with Historic Preservation Overlay (T5 (HP). Study area C will be rezoned from Residential – One Historic (R-1H) to Transect Zone 4 (T4).

In a report to City Council, city staff would present findings of fact that show the rezoning is in conformance with the city’s 2008 Comprehensive Plan and the 2010 charrette that led to the adoption of the city’s initial form-based code and visualization survey results from 2010. The financial costs of the rezoning would only include staff time devoted to reports to the Planning and Zoning Commission and City Council. Additionally, mail costs would be at the cost of postage and only apply directly to the parcels to be zoned. Legal challenges to the process
will be minimal, as the groundwork for the rezoning had been accomplished through the charrette process and the initial 2011 rezoning.

Challenges by certain property owners however may be this option's greatest impediment. For section A, the present property owner, the Bellevue Vets, refuse to consider the development potential of the recreational fields behind their bar. The proposed rezoning will be met with resistance by the group and can only pass with a strong vision from the city's political leadership.

Residential challenges for section B will be mixed. Potential controversy regarding the zoning can be contained if the city reaches out to local businesses to inform them of the rezoning. This would be accomplished by fostering the strong relationship the city has with its Renaissance District, which is made up of business owners along Fairfield Avenue. There is very little anticipation of resistance from section C aside from the persistent myth regarding a shopping development from the prior rezoning proposal.

**Option 2- Overlay Zone**

Development of the overlay zone requires two components that will ultimately be subject to a decision by City Council. The first component is the development of a text amendment that will tie the overlay zone to the proposed Infill Transect Map. The Overlay Zone which would be titled “Traditional Neighborhood Development Overlay (TND)” will contain text that enables the property owner to construct new development or anything that is improved beyond fifty percent of its value as something that can be regulated under the form-based code as opposed to the existing zoning designation. Text for this proposal will have to refer to the expanded regulating map.

City staff will present this option with findings pointing to the 2010 charrette, visualization survey and 2008 Comprehensive Plan. Staff could also argue that this option
provides the community with flexibility between property owners who prefer the existing zoning regulations and those that may utilize the new form-based code to redevelop vacant parcels in the historically walkable areas of the city. Examples of would include certain properties can cannot be built on under the existing zoning code and provisions that could protect areas such as Fairfield Avenue.

Challenges to this option arise in a few areas however. The major concern would be the applicability of the expanded implementation map from 2010. This may cause legal concerns as the city has not formally adopted the map and would have to use it as a guide. This would be a possible vulnerability in due process. An alternative that may fix this is to develop each transect zone as an overlay. Financial costs would include staff time plus the cost of the properties that will be rezoned as well as the additional staff time to develop the text amendment and redraw the map.

Political and residential challenges to this rezoning are expected to be minimal. The availability of having a choice between two codes seems to have reduced resistance according to the review of literature. City Council will offer less resistance as it accomplishes a goal of the city but does not substantially impose new regulations on existing property owners.

**Option 3 – Phased Zone**

Development of the phased zoning overlay will require several components. The first would be to rezone each section area as a P zone. Once that is established the city would have to review whether it has to update its comprehensive plan to rezone the different section areas. Since the 2008 Comprehensive Plan has already stated that one of the goals of the city would be to adopt alternative land use regulations such as the form-based code, this would already be
accomplished. From that review, the city could then move forward with rezoning those areas at a later time.

Although there will likely be questions regarding the nature of this rarely used zoning tool, staff would expect little resistance to the rezoning. However; the effectiveness of this option could be questioned by the city council. The main question concerning this option is why should the city conduct this type of rezoning when other options have the ability to yield different results than the existing zoning? Cost would also be a factor, as the cost of rezoning would be doubled: Once for rezoning to the phased zoning and another for the final rezoning.

The only benefit of phased zoning would be to indicate the city’s intent to implement some type of form-based code in the study areas but give the city time to study the appropriate transect zones or zoning changes to accomplish its intent. This would be unnecessary if the city desires to move forward with the 2010 implementation map.

**Option 4 – Text Amendment**

According to the methodology, the text amendment option can be broken down into two similar but slightly different alternatives. Alternative one is to list “Form-code Development” as a permitted use. The second intends to place it under conditional uses which will subject applications to approval by the Board of Adjustments. For both options the definition of the term will be added to Section 7 of the Zoning Code, which defines key terms. The language would likely read:

“Form-code Development: New construction or significant alterations beyond 50% of assessed value that intend to follow the rules and regulations of Section XXI of this code. The corresponding transect designation from the adopted historic area transect map will be used as a guide for this development.”
The option will be inserted into the existing zones that have transects identified in the historic area map. These zones include R-1A, B, C, H residential zones and NC-1 and 2 Neighborhood Commercial Zones as identified in the methodology. Both options are the least costly of the alternatives, aside from Option 5, requiring only staff time and advertisement costs for the Planning and Zoning Commission meeting.

**Findings for Option A**

Staff findings that will be brought to council will include conformance with the 2008 Comprehensive Plan, visualization survey and charrette. City staff intends to argue that the proposed text allows the expansion of the form-based code as an option under existing zones thus minimizing any potential challenges from residence. The option will also be presented as being in conformance with the codes desire for streamlined permitting as it will allow form-based code development to happen as easily as obtaining a building permit with the city.

**Findings for Option B**

Option B will seek to place “Form-code Development” under conditional uses. The following text will be included as part of the conditions the Board of Adjustments will use to evaluate form-code projects under this option:

- Building must be new construction or substantial modification of primary building.
- Must be located within alternative regulating plan map area.
- Change of use subject to board approval.

Staff will make similar findings to Option A. However staff will make the argument that because the option will exist in conventional zones property owners may be confused as to which code would apply to their property. Additionally, allowing the zoning as permitted could allow property owners to “cherry pick” from which code they would choose to follow. Placing the
decision-making control under the Board of Adjustments control does two things; it allows the city to have a greater say in case-by-case developments within the area, and it allows the city to track which properties are now regulated as form-based code properties through a “Certificate of Land Use Restriction” which has to be filed for every conditional use and variance approval from the Board.

This approach will add a regulatory barrier to what is intended to be a streamlined process; however it is politically desirable given the city’s political leaderships desire to have some sense of input on development projects in the city. As referenced before, concerns about oversight plagued the initial implementation of the form-based code, and it is expected that the same concerns will manifest again with this project.

**Option 5 – Do Nothing**

Option five would be the easiest of the hypothetical implementation scenarios since the city would basically do nothing to change the ordinance. There are no costs, political or legal risks involved in this option. The option will not cause inquiry or resistance from residents however it will dissuade a few property owners who had been looking forward to using the form-based code for relaxed regulations on corner stores and redevelopment of vacant non-conforming lots. Staff may argue that the code is either too new or must be revised for greater integration with the existing zoning code before moving forward with any options and alternatives.

**5.2 Scenarios Tested**

Hypothetical scenarios, which are listed below, will be tested against the existing zoning framework for each study area. It is the intent of this study to use this data as a basis for measure against the other proposed alternatives. Rendering for each hypothetical development scenario can be found in Appendix B.
Project Development under Option 1

Project 1

The project consists of over fifteen acres of green field and an elevation change of more than twenty feet from the existing street-side building along Fairfield Avenue. The project will be zoned T.5.5 which allows for the maximum block perimeter of 2400 feet if constructed with structured parking. Because of floodplain issues with the lower elevation, a sub-level parking structure will be required to elevate the entire development out of the 100-year floodplain.

The block perimeter regulations can be met by creating a new street through the middle of the development. Ideally two additional streets can be extended through the development; one with a connection to Division Street and another to Ross Avenue. The connection of these two roads to Riviera Road allow for alternative access points to the rest of the city that bypass congestion on Fairfield Avenue. It additionally allows access to the parking garages without disturbing the existing streets. The new streets will be built in accordance with the street regulations of the code and will be required to have curbs, narrower turning radiiuses at intersections, on-street parking, sidewalks, street trees and lights.

Building frontages will be required to be close to the streets. Building height will be a minimum of two stories and maximum of five. A mixture of uses ranging from retail, office and residential can be provided. First floors will likely be retail based, although it does not have to be. Office or residential uses can be located on the upper floors of each building. Lighting fixtures are required to be historic acorn style luminaires and street trees are required to be planted alee style per the code.

A civic square can be incorporated into the middle section of the development atop the parking garage to preserve some park space taken by the development. The square would be
designed to be a focal point of the development and may be located behind enfronting buildings and accessible through pedestrian passageways between different buildings.

Project 2

The rehabilitation of 711 Fairfield is certain. A developer could choose to develop a small street fronting building adjacent to the existing building. The buildings could be attached or separate according the build-out requirements of the code. The building can be a one story storefront but room is also provided for a two or three story development with residential space on top.

Parking in this development would be regulated by the form-based codes parking requirements. Some space in the rear of the lot could be reserved for surface parking (preserving what is already there). Parking for the development also receives reductions from on-street parking and nearby off-street parking that is worked out through negotiations between the developer and the owners of other lots. Ultimately, however, the intensity of uses in this development will be regulated by the availability of parking.

Project 3

The house is allowed to reconstruct under a similar footprint, as the setback requirements under T4 will allow for it. It can be a one story house or two-story house and would be allowed to utilize as much space as the lot allows. Rear alley parking would be mandatory. The building would have to utilize permitted street frontage types in the form-based code.

Project Development under Option 2

Project 1

The developer has the option to go through either the existing zoning or utilize the form-based code. Because the existing zoning is primarily Mixed-Land-Use, any development in this
space would require Planning and Zoning Commission approval. If the developer chooses the form-based code, then the outcomes of this project under Option 1 are feasible. This option is favorable to developers because the form-based code is permitted “by right” and will not need extra permitting or delays due to negotiations with the city’s commissions. It keeps political interests out of the process as well. However, if the developer decides to pursue a development under the existing code it would be developed in similarly to Option 5.

Project 2

The developer has the option of by-right approval through the form-based code or the existing Neighborhood Commercial One with Historic Preservation Overlay zoning designation. Once again, the development does not need to go through Planning and Zoning Commission if it is developed under the form-based code regulations. In this instance however; it may be beneficial for the development to go through the Planning and Zoning Commission as there are no parking requirements under the traditional zoning code (Section 10.14(D) 1). The development would also be required to go through Historic Preservation Commission by either method. This would ensure that building style and materials are of the quality demanded by the historic district guidelines.

Project 3

The house can be redeveloped under either the form-based code or traditional zoning. However; the traditional zoning setbacks for this zone are overly restrictive for the construction of a new house on this corner parcel and trigger the need for a variance. The house, if constructed under the existing zoning would have a smaller building footprint. Under the form-based code, the house would be allowed to locate up to the street, allowing the developer to
maximize the development potential of the lot. In this instance it is more likely the developer would choose the form-based code.

**Project Development under Option 3**

Since Option 3 is the phased zoning option, the zone change to these areas will not affect the existing regulations on which they would be developed. Since the phased zoning implies a future intention to rezone, the current zoning option is the only method for moving forward with these options. Therefore the possibilities presented under Option 5 are the most likely to be implemented.

**Project Development under Option 4**

There are two sub-options for Option 4. Option 4a permits the code to be used for new development by right in the applicable zones. The developments under this option will face the same fate as the optional overlay in Option 2 if the form-based code is utilized. Developments that choose not to use the form-code would likely follow the path of development outlined later on in Option 5.

**Project 1**

The second option, Option 4b, gives the Board of Adjustments the ability to make discretionary modifications in conformance with either regulatory code for new developments. For project one this would likely be negotiated with the Planning and Zoning Commission and not the Board of Adjustments because a majority of the land is located within the Mixed-Land Use zoning designation. The development could proceed as a compromise between the intent of the code, with the Planning and Zoning Commission making some exceptions, such as in block-size or frontage types for the development.

**Project 2**
For project two, the developer could utilize a combination of the existing code and the
form-based code to permit the development to be exempted from the parking requirements of the
form-based code. This is one instance where this type of regulatory exemption may be necessary.
Although the form-based code has generous exemptions and allowances for parking its
regulations would still hinder a developer’s ability to develop the site as is. Instead, the
developer could apply to construct a form-based code style development without the
requirements for parking for the code. Instead the developer would use the existing zonings lack
of off-street parking restrictions for their development. Additionally, the political element is
preserved as community leaders still have a say in regulating the type of developments going
onto the property.

Project 3

There are few opportunities for exemptions or conditional approvals for the third project.
The project may ask for setback relief by opting for the form-based code. However the elements
of the form-based code are purely optional and if the developer chooses that route, it would be up
to the Board of Adjustments to determine which sections of the code shall apply and which the
development can be exempt from.

Project Development under Option 5

Project 1

Under Option 5, the existing zoning mandates that the city’s Planning and Zoning
Commission approve all developments in the Mixed-Land Use zone. Therefore, development
under this option for this project site can be whatever the developer believes the demand for the
market entails and what the Planning and Zoning Commission approves. There are some
restrictions for uses according the city’s Zoning Regulations but the style, form, shape and
intensity of the proposed use is entirely dependent on the discretion of a single city board. It is likely that a monolithic development could be proposed here, with parking underground. Access could be limited to just a few egress points along existing roads. Building height could sore higher than five stories and development could be entirely closed off from the rest of the community.

Project 2

Project 2 under option five, could develop closely in line with what the form-based code would have permitted by-right. However; instead of by-right approval, the plan would need approval from the city’s Planning and Zoning Commission and Historic Preservation Commissions. The outcome may be similar since front yard parking is banned along Fairfield Avenue in the current code. Parking as a whole is not required for development in this zoning district although the developer would have to address this aspect when presenting to the Planning and Zoning Commission.

Project 3

A house would be constructed on the lot. It would be set back further away from the front yard due to the existing zonings setback of twenty feet. This means the building will be further back than the other houses along the street. The secondary corner side will be set back ten feet because it is a corner lot, thus constraining the building footprint even more. On the opposite side, the setback is three feet so the house will be required to be closer to the adjacent property due to the narrowness of the lot. A garage or parking pad along the rear can be constructed with access to the alley. Since the property is not in the local preservation district it is not subject to design review. It can assume any style of frontage and use any combination of materials.
5.3 Scenario Analysis

One of the factors not initially considered in the initial methodology, but very important to the determination of which method is the most productive is the predictability of the scenario development outcomes. Predicability is the level at which the city or an outside observer can determine the form and type of building that will be constructed on a certain site. The previous section reviewed each scenario and found that there are varying degrees of outcomes for each type of scenario. It was important to measure and draw comparisons between the existing codes, hybrid codes and the mandatory form-based code. This measure could lead to some distinct findings.

Under Existing Zoning

The biggest concern identified under the existing zoning for large lot development in Project 1 is the factor of unpredictability within the existing code. With the existing MLU zoning, land development becomes a political negotiation between the city and the developer. Although the negotiation can lead to a sense of satisfaction by community leaders and staff, the resulting development could leave unintended negative impacts on the surrounding area, fail to achieve the developers lofty ambitions or the goals of the city’s comprehensive plan. Prior experience with this zoning designation has generated isolated suburban type buildings that are setback from the main street, isolated from the rest of the community and auto-centric. Mixing of uses tend to be through separate buildings instead of in a common building and residential development is closed off to the existing city fabric, often utilizing anti-social building and site design strategies to further separate the new development from the existing city.

Utilizing existing zoning in the Fairfield Avenue scenarios has generated more positive results. This is because the zone has regulations preventing the development of parking or drive
lanes along the street frontage. Historically this has prevented the increase in drive lanes and front parking lots on the historic main street. However; the lack of a zoning setback maximum creates the possibility of a new building being setback further from the street than what would be desired. Once again development in this zone must pass through the city’s Planning and Zoning Commission, which renders the developer to the will of a political body. The biggest advantage the existing zone has over the existing form-based code is the lack of parking requirements for development. However the existing zoning regulations maintain that land currently devoted to parking must be preserved (Bellevue, 79).

The biggest constraint for the existing residential zoning is the ability to utilize land on narrow parcels. The zoning setbacks for Residential One – H (R-1H) were restrictive in the sense that they required a new building to be setback further than the other houses on the block and restricted the ability of the landowner to develop the secondary frontage to an acceptable width. A GIS analysis of the parcel showed that any new house on that spot would be required to have a narrow thirteen-foot wide footprint. Relief from these setbacks would need to be granted by the city’s Board of Adjustments, adding an element of uncertainty to a simple housing development.

**Under Optional Zoning**

There are commonalities under both optional zoning designations. For larger sites such as Project 1, there are advantages to using the form-based code in that it will grant development without engaging the political process. However; as many communities with optional codes have experienced, the developer tends to ignore these advantages unless there are some type of monetary or other incentives attached to the form-based code.

For the commercial development, the form-based code once again offers a way to bypass approval by commission however the parking requirements may pose a challenge for any
development on-site. Developers may opt to go the route of conventional zoning if the requirements under the form-based code make development under it unfeasible.

Housing development in the historic section of the city would continue to be difficult under traditional zoning. It is in this scenario where the availability of the form-based code would allow the most flexibility for the developer, which would now be able to utilize more of the available lot for the house. Under the text amendment alternative, Option 4, the developer may end up going to the Board of Adjustments anyway for the form-based code. This option may not be as advantageous for the developer.

**Under Mandatory Form-Based Code**

Large site development under the mandatory form-based code presents its share of opportunities and options. The form-based code heavily encourages the developer to work with the city in understanding the regulations and working on interpretations of the code. This may sound like a negotiation, but it is one that is taken with the knowledge that certain qualities of development, mainly placing parking behind buildings, honoring street frontage and standards for new streets, are law and cannot be negotiated. In this instance the form-based code dictates a higher standard, one that may not have been as inclusive if regulated under the old code.

For neighborhood commercial district development under project 2, the code would require the new building to front the street with one of the frontage types for T5 provided by the code. Under the codes parking requirements, a storefront that is less than 1,500 square feet is exempt from requiring parking. There could also be a desire for apartments or office above the retail frontage. These uses would require some parking. If the rear parking spaces on the existing lot do not fulfill the form-based codes parking requirements then the developer would have to become creative in finding parking solutions.
In the residential neighborhood, the mandatory form-based code would allow more flexibility for the construction of a new home on the narrow lot when compared with the existing zoning. The full utilization of the lot and mandatory frontage requirements will assist with design and construction of a residential building that is more in line with the character of the surrounding historic development, despite the lack of a historic district overlay. In this regard the form-based code acts as to a higher standard that the zoning code yet does not guarantee full aesthetic review as would be required in a historic district.

**5.4 Results Schematic**

The above analysis was broken down into numerical values to be compared between each option. Scores were tabulated to assess which option granted the greater benefit to the city with the least amount of legal and logistical resistance. Sites were assessed as to whether or not the proposed or existing framework enabled the site to be developed and to the degree development becomes impeded by requests for variances or development plan review. Finally, scores were given to determine the likelihood that the end result would be consistent with the city’s existing development pattern. Results are below:

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<tr>
<th>Implementable</th>
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<th>2A</th>
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<th>2C</th>
<th>3</th>
<th>4.1A</th>
<th>4.1B</th>
<th>4.1C</th>
<th>4.2A</th>
<th>4.2B</th>
<th>4.2C</th>
<th>5A</th>
<th>5B</th>
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</tbody>
</table>

The results schematic confirms that for large lot developments, the zone change option is the easiest and most effective. The form-based code also proved to be the most effective for
residential development as discussed under project 3. In this instance, the existing zoning was extremely prohibitive on lot size and setbacks which would have required an applicant to apply for several zoning variances. Additionally, the resulting development would likely not be contextual with the existing neighborhood making it the second lowest rating for this option.

Projects under the Phased Zoning option were ranked the lowest. This is likely due to the relative ineffectiveness of the rezoning which only serves to declare a zone to be rezoned after a plan update. Thus, the scores for development and contextual mirrored those under the Status Quo option. This option ranked low for legal due to its rarity in enforcement and legal challenge and low in implementable due to the requirement for a unnecessary plan update and subsequent second zone change after the plan update.

For redevelopment within the existing downtown business district both the Zone Change Option and the Status Quo Options tied. Whereas the form-based code would enable more contextual development, parking standards hinder the possibility of this option from getting the highest score. The existing code was rated easiest to implement because it is already in effect however the legislative barrier of bringing developments before the Planning and Zoning Commission caused this development option to lose points in the Developable category.
Chapter 6: Conclusion & Recommendations

The findings provided above can be measured utilizing some scope of the methodology. After review and comparison of these implementation factors it was determined that a full zone change is the best option for large lot redevelopment and residential infill development. However a tie in the historic downtown development highlights different strengths and weaknesses in both land use codes.

Based on the findings, court cases, implementability of each option it is safe to conclude that the differences between zoning and form based code are very subtle in implementation. The biggest and most challenging difference is the involvement of the public and the scope of the public process. At the end of the day a form-based code is a zoning code but the process or lack of process will dictate community buy-in and effectiveness. A poorly drafted top-down code will have just as much negative impact as a traditional Euclidean code.

With these findings there are several recommendations that can be made pertaining to refining land use regulations in the city of Bellevue. These recommendations are also intended for other local governments looking to follow Bellevue’s path in adopting a parallel form-based code.

6.1 Recommendations

Bad or misaligned zoning is an incentive for optional overlays.

In the analysis for the residential component, it was found that the existing zoning rendered development very infeasible or at least certainty of development very precarious. Suburban residential zoning, which was imposed on many older municipalities with the initial adoption of zoning ordinances continue to serve as an impedance in developing new housing that meshes well with the existing neighborhood. This top down unilateral approach makes any
alternative preferable as analysis indicated that despite whatever regulatory hurdles put in place, overlay zone or approval from the Board of Adjustments, it was preferable for both the developer and the city to utilize the form-based code as an option.

**Parking requirements are a hindrance to development in either code.**

Although this paper does not go into depth about the nature of the city’s existing off-street parking requirements, they are generally a hindrance to development where they are enforced. The exception however is an exemption from off-street parking requirements in the existing zoning for the city’s downtown district. This language was developed to fuel revitalization of the downtown and prohibits the demolition of historic storefronts for additional parking demands. It essentially removed parking requirements from the city’s downtown.

However, the form-based code does require parking and utilized parking requirements as a check on density. This unfortunately limits development options for the historic core which may have difficulty fulfilling parking requirements as parking calculations still require some off-street parking for retail uses over a certain size. Reforms to the code should either eliminate parking requirements or give greater exemption for storefront sizes in the existing form-based code.

**A form-based code encourages a more engaged citizenry to a point.**

Based on Bellevue’s experience in adopting the form-based code and some legal support from the case law such as Restigouche v. Town of Jupiter, it appears that reforms such as form-based code endure with greater protection from legal threats if they are enacted with the support of findings from public workshops such as the Visualization Survey and the charrette. These activities give stakeholders an outlet to express their preferences and provide input on land use reform. However; it does not give local governments the right to ignore legal issues regarding
enforcement and takings. Additionally, the public process must be carefully constructed in order to ensure that these meetings do not descend into neighborhood complaint sessions or airing of other general civic grievances.

**Form-based code does not prohibit bad development.**

A form-based code will not save municipalities from bad development per se, however a well worded code limit the negative impacts of bad development. The SmartCode, intentionally regulates use vaguely based on the belief that the form of a building will dictate its function. In Bellevue’s experience, the legality of a super-block type development and the minuscule efforts of suburban redevelopments have shown that enacting this type of code may not generate the exactly what the city wants. The existing zoning however had less ability to force conformance on these issues and may have produced a less desirable result. The Bellevue form-based code is better but not perfect and based on these examples will require certain reforms.

**Zoning reform can tackle the issues form-based code cannot handle adequately.**

Most New Urbanists would argue that Euclidean Zoning is outdated. They are correct however that does not mean zoning and land use regulations cannot evolve. Where form-based codes such as the SmartCode and other examples attempt to market themselves as the evolutionary solution to Euclidean Zoning municipalities must realize that some of the things zoning does well should be maintained. For example, a brief read through of Miami21 illustrates a SmartCode’s attempt at regulating fences, signs and other typical zoning issues. The result is that this form-based code continues to regulate many things the same way a traditional zoning ordinance would. And this is even in a place where zoning reform has occurred at the state level.

This is not to say that form-based codes should not be pursued but however that it will take a marrying of the two concepts to realize a more coherent and effective land use strategy.
The new urbanists are right in the fact that one size does not fit all. That is why municipalities should be encouraged to develop and/or reform their own land use codes based with solid public input, attention to context and placemaking to provide a land use tool that suits the community’s needs.

6.2 Conclusion

Form-based codes are in no way a communities silver bullet to end development woes. This paper has found that form-based codes, the latest and greatest in land-use regulations, cannot and should not be a panacea for communities looking to regulate out bad design. However; it is a step, one of many, in the right direction. Form-based codes are a tool that when properly used can create neighborhoods and town centers with great form, can create street networks and engaging public places, and can hold new development to a higher standard but they must be applied properly. The public charrette is the greatest findings tool for code calibration available to a community looking to engage in any type of coding or visioning. It is focused, intensive, inclusive and powerful, but community engagement in the planning process cannot end there. Sustained constructive and positive public input can help coding evolve past the form-based code and possible into a new land use paradigm for future cities.

For Bellevue, the way forward is clear. Two out of the three scenario and implementation tests show that mandatory implementation generated the best results from a development, legal, contextual and implementable standpoint. In pursuing mandatory implementation through the zone change process, the city would exert unquestionable legal authority in the regulation of land use within the city. However the existing form-based code requires revisions in order to evolve into an effective land use regulatory document.
The city should revise the form-based code to better handle signage, automobile oriented conditional uses and variances. As explored in the case background and appendix, city staff entered nebulous regulatory terrain in attempting to establish a direction with applicants for these types of projects. This uncertainty could open the city up to legal challenges if not addressed through code revision. Another code revision would be to refine or eliminate the parking requirements in the form-based code. Removing this obstacle would increase the scoring for the neighborhood commercial scenario and further reinforce the preference for the zone change strategy.

After revision, the city should expand the code to the remaining parts of the city. Once the code is expanded to the entire city, the need for the traditional Euclidean zoning code will diminish. City staff should work to integrate elements regulated by the existing zoning code such as accessory structures and fences to the form-based code, thus merging the two ordinances into one coherent land use regulation. This final product would still be called a zoning code in order to comply with state enabling legislation but its operation will be as the city’s form-based code. Additionally, the city should attempt to update and incorporate more comprehensive sub-division regulations into the code.

The final product will be largely legally defendable and would integrate land use regulations in a method that is more understandable to property owners, ease and streamline the approval process for development and codify the cities vision and plan for the future. This plan, much like L’Efantes vision for Washington D.C. will allow Bellevue to develop for its future in the vision of its citizenry.
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Appendix A

Harbor Greene

Harbor Greene is a $100 million riverfront development project that would have featured three condominium buildings, and a mixed use commercial building on ten acres. Only one of the condominium buildings were constructed along with a four story commercial building that houses a L.A. Fitness gym on two floors and Daymar College on the top floor. There are two retail tenants, a tanning salon and a laser hair removal clinic, on the first floor.

The project had developed through several revisions under a zoning designation named, Mixed-Land Use. The designation acted as a type of planned unit development zoning designation that allowed development more flexibility from traditional zoning standards but required more process since all development needed to be negotiated with the Planning and Zoning Commission. The designation had been in effect since the mid 1980’s when the area was designated as a redevelopment area and placed under the direction of the Bellevue Urban Renewal Agency. In an agreement with the Ackermann Group from 2003, the city agreed to transfer the property to the group for development with certain stipulations and financial obligations.

After the end of the form-based code charrette process in the summer of 2010, the city attempted to bring in property owners that did not participate in the charrette process. One of which was the Dobbs Ackermann, of the Ackermann Group. During the charrette, Harbor Greene was criticized by participants as being out of character and scale with the rest of Bellevue and in turn the code had been calibrated to prevent the further development of middle and high rise buildings in the city. Even the illustrative plan that came out of the charrette showed townhomes and other less dense development would be viable on the site. Mr. Ackermann asked
if he could change his development proposal to meet the city’s new code, which city staff encouraged him to do so.

Talks between the city and the Ackermann Group progressed since that initial meeting. The city changed the zoning request for the site from T5 to T5.5. This would permit a higher density and more floors. This zoning came into effect in March 2011. Additionally staff also met with him to flesh out a conceptual plan for the new phase of the development. Early design attempts failed to be code compliant but after changing architects his proposal made some progress. A consultant from Placemakers, who helped develop Bellevue’s code, volunteered to assist with the review of the plan proposals the city was receiving from the Ackermann Group.

By August, the developer was prepared to move ahead and had requested at least one variance to the plan. Staff had found that under the existing development agreement the project would have to be approved by the Planning and Zoning Commission, Urban Renewal Agency and the City Council regardless of whether or not it is approvable under the form based code. Another complication was the growing concern from the adjacent condominium community about the apartment project.

By fall of, the Ackermann Group presented their plan to City Council to gauge reaction to the proposed development. The plan received critical and negative response from some council members and neutral responses from others. The condominium owners were in attendance and voiced their concerns, which mainly were a concern about property values and sharing of amenities. It seemed that the very interest groups the SmartCode attempted to prevent from influencing and politicizing planning would be very much involved in opposing the project.

By winter, the city’s Planning and Zoning Commission had met three times to hear the finalized development plan. The finalized plan removed the need for a variance by adding the
required liner buildings along the garage. At each meeting, the condo owners presented their opposition to the plan as staff presented supporting evidence from the form based code and the city’s Comprehensive Plan. In a six to one vote, the commission denied the plan based on evidence best explained by Planning and Zoning Commissioner Jim Dady, “We have been cited the form based code as a reason to do this project. I helped write the form based code, and here is some of what’s in it. ‘The form based code is also intended to promote the following goals, reduction of vehicular traffic congestion, promote a viable pedestrian environment. The intent and purpose of this code is to enable, encourage, and qualify the implementation of the following policies: That the region should retain its natural infrastructure and visual character derived from the topography, woodlands, riparian corridors and the river. That the regions should include a network of transit, pedestrian, and bicycle systems that provide alternatives to the automobile. That a range of open space including greens, squares and playgrounds should be distributed within neighborhoods and downtown.’ We see in this project a few feints in the direction of these goals, but no real commitment to them.” (Bellevue Planning and Zoning Commission 2) As of today, the developer is exploring other ways of moving forward, including litigation.

As the process has dragged on, political proponents of the code have started to question whether the form based code would produce the type of development they had envisioned in the charrette. Although staff would argue that the code has ensured development that is friendlier to pedestrians and the street, it has also failed to ease political concerns about density, massing, viewshed and obfuscated civic engagement as part of the process. These are all concerns that put the future of the code into question.
Harbor Greene 2006 approved plan

Harbor Greene 2011 proposed change
Appendix B

Graphics & Illustrations
Project 1: Large lot development

Project 2: Neighborhood Commercial Development
Project 3: Residential Development

Project 1 under form-based code
Project 1 under existing zoning

Project 2 under existing zoning
Project 2 under form-based code

Project 3 under existing zoning
Project 3 under form-based code