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acres is all the Michigan
we will ever have."*

Former Governor
William G. Milliken

Michigan State University
Extension Land Use Team

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Form Based Codes and Michigan Zoning Enabling Acts

Form based code, or form based zoning is a new type of an approach for zoning that is starting to catch on in Michigan. Simply put, form based code places more emphasis on the design (form) of development and redevelopment, and proportionately less emphasis on use. This pamphlet is to discuss its legal application under Michigan's zoning enabling statutes.

"When I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck." Attributed to Richard Cardinal Cushing

Although a new zoning ordinance in a "form-based" format, may not look exactly like a duck – it will walk, swim, and quack like one.

Legislative Authority

A concern of adopting a form based code is whether or not there is sufficient legislative authority to write, adopt, and implement form based regulation in Michigan. This question is raised in light of an initiative¹ in the state of California to specifically enable form based coding.

Most of the zoning enabling legislation adopted prior to 1924 was based on the New York general city enabling act of 1917. This would include P.A. 207 of 1921, as amended, (being the City and Village Zoning Act, M.C.L. 125.581 *et. seq.*) in Michigan. Most of the zoning enabling acts adopted after 1924, however, were modeled on the *Standard State Zoning Enabling Act*, prepared by the United States Department of Commerce and first published in 1923 with the final version printed in 1924. This would include P.A. 183 of 1943, as amended, (being the County Zoning Act, M.C.L. 125.201 *et. seq.*) and P.A. 184 of 1943, as amended, (being the Township Zoning Act, M.C.L. 125.271 *et. seq.*) in Michigan. Although many current zoning enabling acts embody substantial changes from the Standard Act, the majority retains its substance.

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¹ Assembly Bill 1268 of 2004 making California the first state with specific enabling legislation for form based zoning.

In Michigan both the above acts were used to create the current statute in Michigan: P.A. 110 of 2006 (being the Michigan Zoning Enabling Act, M.C.L. 125.3101 *et seq.*).

We should first note that in the planning community, California, along with such states as Florida, Washington, and Oregon are considered in the eyes of some “progressive,” and in others as the “lunatic fringe,” of planning and zoning efforts. This is by way of saying that the desire for California to codify form based coding may be more a function of how zoning works in California, and is not necessarily transferable to Michigan.

Michigan Zoning and Form Based Codes

Even without specific enabling legislation, a strong argument can be made that Michigan's current enabling legislation provides sufficient authority when read in the context of the intent and purpose of form based coding.

The Michigan Zoning Enabling Act of 2006 was built on the three Michigan acts discussed above. The current Michigan statute contains the basic enabling language for zoning in Michigan. Section 201 discuss the general purposes of zoning, which include, among others, insuring that uses of the land are “situated in appropriate locations and relationships;” and limiting “the inappropriate overcrowding of land”²

The Act then describes methods of implementation for setting up various zoning districts, saying:

“The zoning ordinance shall be based upon a plan”³

²Section 201 of P.A. 110 of 2006, as amended, (being the Michigan Zoning Enabling Act, M.C.L. 125.3201. (This footnote, in earlier versions of this flyer, used to cite the following acts, each repealed as of July 1, 2006: Section 1(1) of P.A. 207 of 1921, as amended, (being the City and Village Zoning Act, M.C.L. 125.581(1)); Section 1 of P.A. 183 of 1943, as amended, (being the County Zoning Act, M.C.L. 125.201); and section 1 of P.A. 184 of 1943, as amended, (being the Township Zoning Act, M.C.L. 125.271).)

³Section 201(1) of P.A. 110 of 2006, as amended, (being the Michigan Zoning Enabling Act, M.C.L. 125.3201(1).

A local unit of government may provide by zoning ordinance for the regulation of land development and the establishment of 1 or more districts within its zoning jurisdiction which regulate the use of land and structures to meet the needs of the state's citizens for food, fiber, energy, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land, to ensure that use of the land is situated in appropriate locations and relationships.⁴

The form based code works on essentially the same principle; districts are still present and the regulations still address the uses permitted, and set up the “special regulations” applicable to those uses within the districts.

Equally important, the section 203 requires that the regulations and districts be based on a plan. While this provision has generally not been strictly interpreted in the past (some court decisions have considered the zoning map to be the “plan”), a plan should have strong backing for form based regulations. Under the Michigan Zoning Enabling Act the requirement for zoning to be based on a plan is even stronger.⁵ The Code author should then incorporate directly the principles and “themes” outlined in the plan as another basis for the regulations.

Another key provision of the Zoning Act is “Regulation of buildings and spaces”:

“Sec. 201(4) A local unit of government may adopt land development regulations under the zoning ordinance designating or limiting the location, height, bulk, number of stories, uses, and size of dwellings,

⁴Section 201(1) of P.A. 110 of 2006, as amended, (being the Michigan Zoning Enabling Act, M.C.L. 125.3201(1). (This footnote, in earlier versions of this flyer, used to cite the following acts, each repealed as of July 1, 2006: Section 1(1) of P.A. 207 of 1921, as amended, (being the City and Village Zoning Act, M.C.L. 125.581(1)); Section 1 and 3 of P.A. 183 of 1943, as amended, (being the County Zoning Act, M.C.L. 125.201 and 125.203); and section 1 and 3 of P.A. 184 of 1943, as amended, (being the Township Zoning Act, M.C.L. 125.271 and 125.203).

⁵Section 203(1) of P.A. 110 of 2006, as amended, (being the Michigan Zoning Enabling Act, M.C.L. 125.3203(1).

buildings, and structures that may be erected or altered, including tents and recreational vehicles.”⁶

This directly addresses the specifics of regulation that apply equally to “traditional” zoning and form based zoning. In form based codes, the language is developed with an eye toward a specific physical plan for new development as well as redevelopment. This may include a broad range of regulation that can encompass building alignment toward the street (setbacks, building orientation), spaces between buildings (side setbacks, separation between disparate uses), and heights, each of which can be described in ranges of acceptable values.

Essentially, then, form based coding looks at the same measures and parameters as traditional zoning, just in a more specific manner.

The following phrase in Michigan’s zoning statute is an important one:

“Except as otherwise provided under this act, the regulations shall be uniform for each class of land or buildings, dwellings, and structures within a district.”⁷

This provision will affect the creation of the various districts to ensure that this “uniformity” requirement is met.

Finally, MCL 125.583 contains the following provision, often overlooked in zoning regulation:

“A local unit of government may provide under the zoning ordinance for the regulation of land development and the establishment of districts which apply only to land areas and activities involved in a special program to achieve specific land management objectives and avert or solve

specific land use problems . . .”⁸

There are few, if any, cases that specifically address or, for that matter, limit the meaning or intent of this language, but it appears as though the “specific land management objectives” and “specific land use problems” could be reasonably interpreted as those issues identified through the community’s plan.

Legal Challenges

There are two “Holy Grails” of zoning; the first is to have an Ordinance that can be quickly and easily understood by the “man on the street;” the second is to have an Ordinance free from legal challenge. However, no code, however well written, researched, justified, or crafted will either be completely understood by those who lack at least a basic understanding of zoning, or be free from challenge.

While it is hoped that any code will be at least easier to use, the concerns that are of most immediate interest are those that may directly challenge the code itself, rather than those that may specifically contest the code as it is applied to individual situations.

The Michigan Courts have consistently stated that:

“A facial challenge to the validity of an ordinance attacks the enactment or existence of the ordinance. To establish that a zoning ordinance violates substantive due process protections, a party must show: (1) that there is no reasonable governmental interest advanced by the zoning classification, or (2) that the ordinance is unreasonable because it contains arbitrary, capricious and unfounded exclusions of legitimate land

⁶Section 201(4) of P.A. 110 of 2006, as amended, (being the Michigan Zoning Enabling Act, M.C.L. 125.3201(4)). (This footnote, in earlier versions of this flyer, used to cite the following acts, each repealed as of July 1, 2006: Section 2 of P.A. 207 of 1921, as amended, (being the City and Village Zoning Act, M.C.L. 125.582); Section 3 of P.A. 183 of 1943, as amended, (being the County Zoning Act, M.C.L. 125.203); and section 3 of P.A. 184 of 1943, as amended, (being the Township Zoning Act, M.C.L. 125.273).)

⁷Section 201(2) of P.A. 110 of 2006, as amended, (being the Michigan Zoning Enabling Act, M.C.L. 125.3201(2)).

⁸Section 201(3) of P.A. 110 of 2006, as amended, (being the Michigan Zoning Enabling Act, M.C.L. 125.3201(3)). (This footnote, in earlier versions of this flyer, used to cite the following acts, each repealed as of July 1, 2006: Section 3 of P.A. 207 of 1921, as amended, (being the City and Village Zoning Act, M.C.L. 125.583); Section 1 of P.A. 183 of 1943, as amended, (being the County Zoning Act, M.C.L. 125.201); and section 1 of P.A. 184 of 1943, as amended, (being the Township Zoning Act, M.C.L. 125.271).)

use.”⁹

Reasonable Governmental Interest

It will be important to make sure the community’s plan will need to list and document a number of reasonable governmental interests to support use of a form based code. Those should be embodied throughout the code. The intent is to reference back to the purposes and intent of the community’s plan as often as possible. In addition, there should be an extensive public involvement process, first undertaken to develop and adopt a plan, and undertaken to develop the form based code. It is important to be able to demonstrate the efforts of the community to actively seek out various interests that can provide strong support for this effort.

Exclusionary Zoning

Far from being exclusionary, the form based code will instead contain much more flexibility in the use of land, particularly in areas of high intensities of land use, such as the downtown, as well as in traditional business areas, mixed use neighborhoods, and other similar areas. Again, using the plan and the extensive public involvement effort for the development of the code will help ensure that the form based zoning is not “arbitrary” or “capricious.”

Code as Applied

A second concern may develop as the code comes into more common use, and individual challenges raised during its application to specific properties. In this, the code will need to address both substantive and procedural due process issues. As frequently stated by Michigan courts:

“For the purpose of a substantive due process challenge, a zoning regulation is valid if there is a rational relationship between the regulation and the public

health, safety, welfare and prosperity and the regulation is not such an unreasonable exercise of the police power as to be arbitrary, destructive or confiscatory. Each case is evaluated according to its particular facts.”

In *Conlin v Scio Township* the Michigan Court of Appeals stated:

“To have a rational basis thus affording substantive due process, the means of a zoning ordinance must have a real and substantial relationship to the object sought to be attained. Judicial review of the rational basis of the ordinance does not test the wisdom, need, or appropriateness of the legislation, but tests only whether the legislation is reasonably related to a legitimate governmental purpose. The legislation is valid if the legislative judgment is supported by any set of facts which is known or which can reasonably be assumed, even if the facts are be debatable. In this case, the plaintiffs asserted that the defendant’s density restrictions violated due process. However, the prevention of overcrowding and the preservation of open spaces are legitimate governmental interests, and restrictions on residential density advance those interests. The defendant's zoning restrictions were thus rationally related to legitimate goals, and did not offend due process protections.”¹⁰

Even a quick review of cases related to zoning finds that the Michigan courts have been fairly liberal in what they consider to be governmental purposes. Opinions consistently state that it is not the role of the judiciary to substitute its judgment for that of the community. Although the specific purposes would have to be determined at the time, as they may relate to an individual situation, there is a broad range of legitimate interests from which the Code will be able to draw.

Procedurally, the Code is planned to include a wide range of protections for private property

⁹*Yankee Springs Township v Fox* 264 Mich App 604; 692 NW2d 728 (2004)).

¹⁰*Conlin v Scio Township* (262 Mich App 379 (2004)), the Michigan Court of Appeals.

owners and will propose a much more accessible and predictable review and approval process.

Code Protections

Approvals

The final consideration is the protections for property owners that will be built into the code. The first is the approval process. One way to do this is to build an incentive into the form based code for ease of review and approval if all elements of the Code are met. One of the reasons for the specificity of a form based code is to ensure that the desired “form” of the community, within the context of individual neighborhoods, is maintained. If a development plan is submitted that complies with this form, approval is administrative rather than as part of a discretionary process involving a planning commission or board of zoning appeals. (This will be an important element in “selling” the new code to the development community.)

There should also be options for an applicant to be able to depart from the code. Minor departures from the form based code, for example, may also be reviewed and approved administratively, based on relatively objective criteria. More significant departures then, require additional levels of review. Complete departures will require approval from the board of zoning appeals as a traditional variance.

Ultimately, the intent of the review and approval process is to provide administrative remedies to the applicant that can be used to effectively resolve even major areas of departure from the form based code.

Nonconformities

Another important part of the code is how nonconforming buildings and uses will be treated, as well as correct some of the current deficiencies.

Nonconforming uses and structures provisions of the zoning enabling acts permits a form based code to establish various levels of nonconformities:

“(2) The legislative body may provide in a zoning ordinance for the completion, resumption, restoration, reconstruction, extension, or substitution of

nonconforming uses or structures upon terms and conditions provided in the zoning ordinance. In establishing terms for the completion, resumption, restoration, reconstruction, extension, or substitution of nonconforming uses or structures, different classes of nonconforming uses may be established in the zoning ordinance with different requirements applicable to each class.”¹¹

This provision may be utilized to prevent the unfair application of the code to existing situations by devising a system whereby unobtrusive nonconformities can be addressed separately from those that may have more serious effects on a neighborhood. The nonconforming provisions can be drafted to cover a wide range of situations related to uses as well as site and building conditions. This will afford the opportunity for additional relief to ensure that properties that do not conform to the form based code are fairly treated.

Land Use

The intent of a form based code is to concentrate less on use of land and more on “form” and design. The Code, therefore, in many cases broadens the range of use permitted within the “form” of the building. This permits a broader range of uses in planned areas, while preserving “exclusive” uses in others. Certain development requirements (parking, etc.), again in planned areas, may also be reduced or modified, based on certain criteria. The overall intent is to increase flexibility in use while being somewhat more prescriptive on form.

¹¹Section 208(2) of P.A. 110 of 2006, as amended, (being the Michigan Zoning Enabling Act, M.C.L. 125.3208(2)). (This footnote, in earlier versions of this flyer, used to cite the following acts, each repealed as of July 1, 2006: Section 3a of P.A. 207 of 1921, as amended, (being the City and Village Zoning Act, M.C.L. 125.583a); Section 16 of P.A. 183 of 1943, as amended, (being the County Zoning Act, M.C.L. 125.216); and section 16 of P.A. 184 of 1943, as amended, (being the Township Zoning Act, M.C.L. 125.286).)

Departures and Variances

As noted earlier, there will be opportunities to permit deviations from the code. Although the exact form will depend on the desires of the community, a typical code will permit “departures” that are, in effect, administrative variances, for relatively minor requirements, as well as including a process for board of appeals’ variances.

Conclusion

No guarantee can be made that a form based code will be free from challenge. However, the use

of form based codes, if written to take into consideration of the issues raised in this pamphlet appear to be a proper application of zoning in Michigan. In preparing a form based code the intent should be to design a system that provides a degree of certainty to business owners and neighbors, promotes a range of use and design flexibility to property owners/developers, and institutes protections for those who may feel they are adversely affected.

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