

# Gaining Ground in the Final Frontier: Surveying Legal Issues Raised by New England's Form-Based Codes

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## INTRODUCTION

Publicly-adopted form-based codes have gradually gained acceptance over the last fifteen years as an alternative to the principally use-based local zoning ordinances and by-laws that have dominated land use regulation in the United States since the 1920s. These codes were first adopted with the force of regulation in the south and west before they moved into other regions of the country. By and large, for reasons that remain open to discussion, the region with the lowest degree of penetration for form-based codes has been New England, where the first true form-based code was adopted only in 2005, and the total number of such codes in all six states is still in single digits. This article will discuss in detail three of the adopted codes in New England and three specific legal issues raised by those codes, starting with a review of form-based codes' recent history and concluding that form-based codes are poised to enjoy wider acceptance in the region, which for the time being remains the nation's "Final Frontier" for this alternative approach to land development regulation.

## BACKGROUND AND CONTEXT

### Defining Form-Based Codes

Generally, form-based codes are designed to create complete places by combining private and public development, streetscapes, and public spaces into a single urban ensemble.<sup>2</sup> This approach is to be contrasted with conventional zoning codes' focus on the spatial separation of uses and general disregard for design standards, whether for private buildings or the streetscape and other public spaces. As a result, form-based codes typically contain the following identifiable concepts and component parts, which address topics common to both zoning and subdivision/street standards, as well as related land development ordinances:

*Regulating Plan.* The regulating plan is a map, similar to, but more detailed than, a zoning map, that typically shows streets and public open spaces and designates the specific locations where various building form standards will apply. A regulating plan is an essential means for translating a vision or illustrative plan into place-specific development regulations. The regulating plan in some form-based codes simply replaces the official zoning map or other regulatory maps. Regulating plans, however, often look different from traditional zoning maps, and are presented in many different formats, ranging from frontage-based (identifying the building form standards that apply to a parcel based on the coding assigned to the facing street) and building type-based (identifying only a limited group of building types that can be constructed in a given district) to Transect-based plans

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<sup>2</sup> See Daniel G. Parolek, Karen Parolek, and Paul C. Crawford, FORM-BASED CODES: A GUIDE FOR PLANNERS, URBAN DESIGNERS, MUNICIPALITIES, AND DEVELOPERS (2008) at 11 (Parolek et al.).

that use the Urban-to-Rural Transect as the framework for assigning building form standards.<sup>3</sup>

*Building Form and Functional Design Standards.* Dimensional building form standards and functional design standards, applied to private as well as public development and addressing location, bulk, height, coverage, parking (amount and location), and use, among other things, are commonly presented in a three-dimensional graphic form with accompanying text.

*Streetscape and Public Space Standards.* These regulations, which are left entirely to the subdivision process or to highway or public works departments in conventional land use regulation systems, address the widths and dimensions of streets, parking areas, sidewalks, paths, street trees and furniture, and plazas, and other standards applicable to the creation of the streetscapes and public spaces that are to be principally formed by private and public development.

*Administrative Provisions.* When dealing with a defined portion of a jurisdiction, it is essential that a form-based code's building form, functional design, and streetscape/public space standards be collectively integrated into the broader land development regulations. Another of the goals of a form-based code is to promote predictability in process and effect – allowing development applications that meet all requirements to be approved administratively rather than through a public hearing process, which can too often be contentious, unpredictable, and time-consuming. Typically, a clearly defined application and project review process is included either in the form-based code itself or by reference to another section of the municipality's land development regulations.

*Optional Components.* In addition to the above components, some form-based codes contain standards dealing with the layout and dimension of blocks, building types, and landscaping. Some also include architectural standards, which govern the building details and materials that are permitted and the ways in which they can be incorporated into specific building elements.<sup>4</sup>

## **Origins and Spread**

The advance of form-based codes in the last 30 years has been well-chronicled by Katz<sup>5</sup> and Sitkowski and Spikowski.<sup>6</sup> Here, I will only briefly trace the highlights in order to set the stage for the discussion that follows. Finding their inspiration most importantly in turn-of-the-century town plans created by John Nolen and others, contemporary form-based codes in the United States started as private contractual arrangements, voluntarily submitted to as part of development projects cast as neo-traditional design, traditional neighborhood developments or, later, “New Urbanism.”<sup>7</sup> The best known exemplar is the code for the community of Seaside on Florida's Gulf

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<sup>3</sup> For a brief treatment of Transect-based codes, as exemplified by the SmartCode, see, e.g., Chad D. Emerson, *The Smart Code*, in: A LEGAL GUIDE TO URBAN AND SUSTAINABLE DEVELOPMENT (2008), at 128-138.

<sup>4</sup> The foregoing discussion borrows heavily from the Form-Based Codes Institute's summary of form-based codes available at <http://www.formbasedcodes.org/what-are-form-based-codes>; and from Parolek, et al., at 15-16.

<sup>5</sup> See Peter Katz, *Form First: The New Urbanist alternative to conventional zoning*, NEW URB. NEWS (November 2004).

<sup>6</sup> See Robert Sitkowski and William Spikowski, *Form-Based Codes*, in: A LEGAL GUIDE TO URBAN AND SUSTAINABLE DEVELOPMENT (Wiley & Sons 2008), at 125-128

<sup>7</sup> See Emily Talen, *Design by the Rules: The Historical Underpinnings of Form-Based Codes*, 75 J. OF THE AMER. PLAN. ASSOC. (No. 2, Spring 2009) at 148-149; Congress for the New Urbanism, Charter of the New Urbanism available at <http://www.cnu.org/charter>.

Coast. This code, widely acknowledged as the first modern form-based code, was authored by Duany Plater-Zyberk and adopted in 1982. It was heavily graphical and diagrammatic, conveying its standards principally through drawings, with only brief text, and intended to be seen on a single sheet of poster-sized paper.<sup>8</sup> Form-based codes remained principally private through the remainder of the 1980s and into the mid-1990s, governing development build out in burgeoning New Urbanist communities across the country.<sup>9</sup>

However, starting in the late 1990s and early 2000s, the first public, regulatory form-based codes were adopted in several states, including Florida (West Palm Beach and Kendall), Mississippi (Vicksburg), and Virginia (Columbia Pike).<sup>10</sup> California's "Specific Plan" mechanism, used to great effect by Crawford, Multari & Clark, Moule & Polyzoides, and Opticos Design, among others, established it as the leading state for form-based codes in the early 2000s. In rapid succession, new form-based codes covering either districts, corridors, or entire municipalities were adopted in several California municipalities such as Sonoma (2001), Hercules (2001), Petaluma (2003), Azusa (2005), Benicia (2007), Grass Valley (2007), and Ventura (2007).<sup>11</sup> Central Texas has also become home to new adopted form-based codes including Leander (2005), Farmers Branch (2005), and Fort Worth (2007).<sup>12</sup> The SmartCode, promulgated by Duany Plater-Zyberk starting in 2000 and now maintained by the Center for Transect Studies, is a model form-based code intended to be adopted essentially as a fully-drafted zoning code, entirely replacing a conventional code, with customization at the local level changing the key standards.<sup>13</sup> Today, the majority of form-based codes either adopted or under development rely for their starting point on the SmartCode.

As the foregoing list indicates, form-based codes were principally small city and suburban phenomena until the second half of the 2000s. However, with larger applications gradually coming on line, the stage was set for major cities to adopt new form-based codes that entirely replace their conventional, use-based zoning codes. After years of planning and political wrangling, Miami became the first major American city to adopt a city-wide form-based code with Miami 21,<sup>14</sup> approved in May 2010. Denver fairly quickly followed suit in June 2010.<sup>15</sup> More major cities, including Cincinnati and Buffalo, appear ready to make the attempt.<sup>16</sup>

As a region, New England was long highly resistant to the adoption of form-based codes having the force of regulation. Speculation on the causes of this resistance have ranged from the region's ingrained governmental conservatism (despite its political liberalism) to its highly atomized governmental structure (virtually no county government in the majority of states) and the exceedingly thin budgets of its planning and zoning staff (resulting in large part from the atomized nature of the governmental structure) to its long-standing love affair with the Town Meeting form of local legislative decision-making (certainly democratic, but no one's model for efficiency or predictability). Whether because of one or a combination of the foregoing factors, it took until 2005 before the region's first form-based code was adopted for the redevelopment of the former South

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<sup>8</sup> *Urban Code, The Town of Seaside*, available at [http://codesproject.asu.edu/sites/default/files/code\\_pdfs/Seaside-Urban-Code.pdf](http://codesproject.asu.edu/sites/default/files/code_pdfs/Seaside-Urban-Code.pdf).

<sup>9</sup> See Robert J. Sitkowski & Brian Ohm, "Form-Based Land Regulations," 28 URB. LAW. 163 (2006).

<sup>10</sup> See Katz; Sitkowski & Spikowski at 127.

<sup>11</sup> See Sitkowski & Spikowski at 126; Parolek, et al., at Chapter 4 (Case Studies).

<sup>12</sup> See <http://www.formbasedcodes.org/samplecodes>.

<sup>13</sup> See SmartCode Version 9.2 (2010), available at <http://www.smartcodecentral.org/codes>.

<sup>14</sup> See Miami 21 Zoning Code (Jan. 2011), available at <http://www.miami21.org/>.

<sup>15</sup> See Chapter 59 of the Municipal Ordinance of the City of Denver, Zoning, available at <http://denvergov.org/cpd/Zoning/DenverZoningCode/tabid/432507/Default.aspx>.

<sup>16</sup> See <http://www.cincycharacter.com/index.html> (regarding Cincinnati) and <http://www.buffalogreencode.com/> (regarding Buffalo).

Weymouth Naval Air Station, albeit under a special state law that had been adopted to further the base's reuse plan in 1998.<sup>17</sup> South Weymouth, now re-branded as Southfield, remained an outlier in the region until the adoption of a handful of form-based codes in the last two years:

- Lowell, MA (Hamilton Canal District) – February 2009;<sup>18</sup>
- Jamestown, RI (village district) – October 2009;<sup>19</sup>
- Hamden, CT (town-wide, with focus on commercial corridors) – December 2009;<sup>20</sup>
- Dover, NH (downtown district) – December 2009;<sup>21</sup> and
- Newport City, VT (downtown area) – December 2010.<sup>22</sup>

This spate of FBC adoptions has left Maine as the only state left in the region without at least one adopted form-based code.

### **Overcoming Concerns over Authorization**

Not surprisingly, there was initial concern about the consistency of FBCs, as public, regulatory enactments, with the standard state zoning, planning, and subdivision enabling acts that have formed the state law basis for land regulation over the last 75 years.<sup>23</sup> In Wisconsin, Pennsylvania, and California, political conditions were such that changes to state law to remove any ambiguity were possible.<sup>24</sup> At the same time, multiple authors took up the challenge and reviewed the standard enabling acts upon which the land use regulation system relies across the country: the Standard State Zoning Enabling Act and the Standard State Planning Enabling Act.<sup>25</sup> Ultimately, these authors concluded the standard acts had sufficient flexibility in them to validly authorize form-based codes without modification.<sup>26</sup>

As part of that discussion, reexamination of the foundational zoning case of *Village of Euclid v. Ambler Realty*<sup>27</sup> reminded observers on all sides that the U.S. Supreme Court, while deciding that use-based zoning could not be characterized as unconstitutional at the time and therefore giving such a regulatory approach approval, understood that separation of uses was actually only one of several potentially rational means to approach the issue of regulating land development. Justice Sutherland's majority opinion in *Euclid*, after describing the benefits that the Village claimed would flow from the segregation of incompatible uses from each, stated, in summary, only that

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<sup>17</sup> 1998 Mass. Acts Chapter 303, as amended. The Southfield Form-Based Code is *available at* <http://www.sstfdc.com/pdfs/3-ProjectDocuments/10-Zoning%20&%20Land%20Use%20By-Laws.pdf>.

<sup>18</sup> See Hamilton Canal District Form-Based Code (adopted February 24, 2009), *available at* <http://www.hamiltoncanal.com/document-library/public-docs.aspx> ("Lowell FBC").

<sup>19</sup> See Jamestown Zoning Ordinance (as amended through March 1, 2010) at Article 11, *available at* <http://www.jamestownri.net/zoning/Final%20Zoning%20amended%203-1-2010.pdf>.

<sup>20</sup> See Zoning Regulations, Town of Hamden, CT (as amended through August 15, 2010), *available at* <http://www.hamden.com/filestorage/37/ZoningRegs010110sm.pdf> (the "Hamden FBC").

<sup>21</sup> See Dover Code, Chapter 170 (as amended through December 8, 2010), *available at* <http://www.ci.dover.nh.us/forms/CH170update10%20-%20with%20rev%20cbd%20tables%20-%20O%20table%20rev%20-%20202.pdf> (Section 170-10) (the "Dover FBC").

<sup>22</sup> See City of Newport Form-Based Code Regulating Plan (July 6, 2010), *available at* <http://www.newportvermont.org//CityDepartments//Zoning//DraftForm-BasedCode>.

<sup>23</sup> See Sitkowski & Ohm at 165-169.

<sup>24</sup> See *id.* at 165-166. California's enactment, Assembly Bill 1268 from 2004, was codified at CAL. GOV'T. CODE § 65302.4.

<sup>25</sup> In addition to Sitkowski & Ohm, the other leading article on the question of state law authorization for FBCs was penned by Chad D. Emerson, *Making Main Street Legal Again*, 71 MO. L. REV. 637 (2006).

<sup>26</sup> See, e.g., Sitkowski & Ohm at 166.

<sup>27</sup> 272 U.S. 365 (1926).

“[i]f these reasons [described earlier in the opinion and pertaining to the usual set of arguments supporting the separation of residential from other uses in a rapidly industrializing society], thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”<sup>28</sup>

In other words, use-based zoning survived the rational basis test, but it was not decreed as the only constitutionally valid way to regulate development. Form-based approaches may therefore turn out to be equally constitutional. None of the foregoing applications of public form-based codes – not even the major city codes that would be expected to engender, and did engender, extraordinary scrutiny from the local development, legal, and architectural design communities – have required state zoning, subdivision, or planning enabling statute changes. This is not to say that there aren’t still issues in the implementation of a form-based code to watch out for or be aware of. Indeed, a review of three of New England’s adopted form-based codes may give us a series of snapshots of what we need to watch for as more of these codes are adopted. And further, one of the hallmarks of form-based codes – their handling of discretionary review – is one of the key considerations.

### **THREE LEGAL ISSUES HIGHLIGHTED BY NEW ENGLAND FORM-BASED CODES**

#### ***Hamden, CT – Addressing Delayed Development Readiness and Governmental Reluctance Through Careful Mapping, But Necessarily Losing Some of the Benefit of the Bargain***

Although a long-standing, substantially built-out suburb of New Haven, the Town of Hamden had largely acceded to auto-oriented growth in the second half of the twentieth century.<sup>29</sup> The focus of the SmartCode-based revisions to the town’s entire zoning ordinance was on its main commercial corridors, running principally north-south and generally recognized as run-down, pedestrian-unfriendly, and underutilized.<sup>30</sup> While leaving the town’s existing residential areas effectively alone, the code’s authors created a series of new districts based on the Transect intended to add development potential to the town’s commercial corridors and bring them forward as mixed-use areas, with some emphasis on clustering the highest intensity around key intersections.<sup>31</sup>

The zoning map adopted with the new zoning provisions in the case of Hamden looks remarkably similar to a conventional zoning code map: it has large color-coded areas without the kind of fine-grained build-to lines and other building placement and frontage/street design standards that would be expected for a regulating plan in a form-based code. Rather than put the desired streets and blocks – and their accompanying regulating plan standards – in the zoning map, amendments were made to the town’s Plan of Conservation and Development that showed preferred location of new streets, blocks, and buildings that would be used to guide consideration of any subdivisions of land and/or requests for project approval by the town’s Planning and Zoning Commission. The practical issue that drove this approach was the expected delay in redevelopment of the town’s larger commercial parcels. Without fully engaged owners seeking redevelopment (whether due to the economic climate or resistance to the new regulatory framework) or, in the alternative, a town government willing to move ahead with the eminent domain takings that would be needed to create the desired pattern, the legal issue that arose was the potential for inverse condemnation claims if the town went too far and put its preferences for the location of new streets, blocks, and buildings

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<sup>28</sup> See *id.* at 394.

<sup>29</sup> See Philip Langdon, *Form-based codes reach critical mass*, NEW URB. NEWS (April 2010).

<sup>30</sup> See *id.*

<sup>31</sup> See Hamden FBC, Zoning Map, principally through rezoning these areas to the new T3.5 and T4 transect zones.

into the zoning map, thus giving them the force of regulation.<sup>32</sup> Although planning activities by themselves are very rarely deemed to constitute a taking, if the circumstances indicate that a “substantial and unreasonable interference with property rights” has resulted from the policy treatment of a particular property, a taking may be found.<sup>33</sup>

This kind of an issue is less likely to arise in a conventional zoning code, where block and street patterns are intentionally left to the subdivision process to address and building placement on the lots thus created is treated with far less care. The lesson to be taken from Hamden is that form-based code drafters need to be flexible and willing to apply regulating plan concepts in a variety of ways. Of course, the end result may be that the benefit of perhaps the most important bargain embedded in form-based codes may be compromised. As discussed by a wide range of observers of form-based codes and as touched upon briefly above, regulatory discretion is supposed to be front-loaded at the time of adoption of the archetypical form-based code.<sup>34</sup> Thus, highly detailed and prescriptive regulations are acceptable to the regulated because if they are followed by an applicant, there should be little to no discretionary review when a project comes forward for final approval and permission to build.<sup>35</sup>

However, this leads to a paradox when areas without existing or with insufficiently tight-knit street networks are to be coded with form-based regulations. The form-based code drafter then has to either have a willing landowner/developer ready to move forward with rezoning and redevelopment of such an area or a municipality ready and willing to move forward with eminent domain takings to create the intended patterns, or there must be some amount of discretion – in some cases, fairly broad – reserved in order to ensure that the key decisions and details that could not be agreed to up front are given appropriate consideration. In this sense, Hamden’s solution is similar to the solution adopted by the drafters of the Sarasota County (FL) and Farmers Branch (TX) Mercer Crossing form-based codes<sup>36</sup> and the solution currently under consideration for a new form-based code under development in the Lowell Junction area of Boston’s northern suburbs of Andover, Tewksbury and Wilmington.<sup>37</sup> In all three cases, the form-based code recognizes the need for further cooperation from land owners in bringing forward their own detailed regulating plans and seeking a form of discretionary approval from the applicable local governmental board or commission, while providing a set of rules for drafting those regulating plans and trying to focus the review process on compliance with those rules instead of revisiting the regulatory decision every time a new project comes forward.<sup>38</sup>

### **Dover, NH – State Law Requires More Review Than Is Needed**

The City of Dover, lying in New Hampshire’s seacoast region, already had a zoning district classification – the “CBD” district – covering its relatively healthy downtown core. That district, however, suffered from the standard drawbacks of conventional zoning districts – among them, a

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<sup>32</sup> See Robert Meltz, Dwight H. Merriam, and Richard M. Frank, *THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION* (1999) at 291-292.

<sup>33</sup> See *id.* at 292.

<sup>34</sup> See, e.g., Mary E. Madden and Bill Spikowski, *Place Making with Form-Based Codes*, *URB. LAND* (September 2006) at 174, 177.

<sup>35</sup> See Peter Katz, “Form First: The New Urbanist alternative to conventional zoning,” *PLAN.* (November 2004) at 18.

<sup>36</sup> See Sarasota County Form-Based Code (2007), available at <http://www.scgov.net/PlanningandDevelopment/PlanningServices/FormbasedCodes.asp>, and Mercer Crossing Code (2006), available at <http://www.ci.farmers-branch.tx.us/work/planning/ordinances/mercer-crossing-code>.

<sup>37</sup> See Tri-Town Development Area Form-Based Code (Public Review Draft) (June 2010), available at <http://www.vhb.com/tri-townfbc/documents.asp>. (“Tri-Town Code”)

<sup>38</sup> See Mercer Crossing Code, *supra* note 33, at 19 (“Rules for New Regulating Plans/Urban Center Reserve land subdivision”); Tri-Town Code, *supra* note 34, at 13 (“Rules for New Site-Specific Regulating Plans”).

limited ability to mix uses, lack of attention to urban design and the overall public realm, and auto-oriented parking and access requirements. The Dover Planning Department's form-based coding efforts accordingly focused on revising this existing CBD district.<sup>39</sup> The downtown area was already built up and unlikely to see any new streets, nor were new streets/blocks necessarily desired. In other words, Dover's CBD is an area that would normally be an excellent candidate for what was just discussed regarding Hamden: with appropriate community involvement and visioning, there was ample opportunity to create highly prescriptive standards that would lend themselves to a highly expedited administrative process for project review.

Unfortunately, a separate municipal code provision,<sup>40</sup> authorized and required by New Hampshire statute outside of the state's zoning enabling act,<sup>41</sup> requires that all development of non-residential uses and multi-family dwelling units is required to undergo site plan review, regardless of whether such development entails the subdivision or re-subdivision of land. For a downtown code with a high level of prescription, and therefore administrative review potential, Dover thus has a recognized handicap. Planning and development review staff have reportedly attempted to keep the site plan review process within its appropriate limits, and not let it devolve into an open-ended project review.<sup>42</sup> But this legal issue should not be immediately glossed over simply because it is out of the planning department's and even the municipality's control. Similar external limitations can have an equal or even greater level of control over development decisions than local zoning. As an example of this phenomenon in reverse, in 2005, the Cape Cod Commission approved an exemption from its Development of Regional Impact review for projects located in the downtown Hyannis core of the Town of Barnstable, designated under the commission's regulations as a "Growth Incentive Zone."<sup>43</sup> The result has been a strong reaction by the real estate development industry, especially prior to the recent downturn and now leading the way out, to pursue projects where a substantial amount of the non-local permitting risk has been removed.<sup>44</sup>

### **Lowell, MA – Keeping Statutory Roles Intact to Avoid Confusion and Comply with State Law**

The Hamilton Canal District Form-Based Code, adopted in 2009 for a 15-acre redevelopment area between Lowell's downtown core and the city's commuter rail station, is another highly prescriptive code.<sup>45</sup> The focus in the Hamilton Canal District code is lot, block, and street type specific regulation. As a consequence, this code comes closest to achieving the benefits of the bargain inherent in form-based codes as a concept. Unless there is a desire to develop in a manner not permitted by the code, there is very little discretionary review.<sup>46</sup>

The standard procedure for a compliant project is administrative, with a 30-day review by a special interdepartmental Hamilton Canal District Review Group<sup>47</sup> concurrent with the standard building

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<sup>39</sup> See Dover Planning Department (NH), Form Based Code webpage available at [http://www.ci.dover.nh.us/planspec\\_out.htm?id=Downtown%20Form%20Based%20Code](http://www.ci.dover.nh.us/planspec_out.htm?id=Downtown%20Form%20Based%20Code)

<sup>40</sup> DOVER MUN. CODE Chapter 149.

<sup>41</sup> N. HAMPSHIRE REV. STAT. ANN. 674:43.

<sup>42</sup> Comments of Christopher Parker, AICP, Dover Planning and Community Development Director at the Northern New England Chapter of the American Planning Association's annual conference, Portsmouth, NH, October 7, 2010.

<sup>43</sup> See *Growth Incentive Zones Regulation Updated*, Cape Cod Commission Reporter (Vol. 20, No. 10, October 21, 2010).

<sup>44</sup> See *2006 Smart Growth Awards Summary*, Massachusetts Office of Commonwealth Development, available at [http://www.mass.gov/Agov3/docs/smart\\_growth/2006\\_sg\\_awards.rtf](http://www.mass.gov/Agov3/docs/smart_growth/2006_sg_awards.rtf); Sarah Shemkus, *New Hotel Planned at Hyannis Harbor* (February 19, 2011) available at <http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20110219/BIZ/102190308>.

<sup>45</sup> The author worked on behalf of the City of Lowell in the review and adoption process for this code.

<sup>46</sup> See, e.g., Hamilton Canal District FBC, Sections 10.3.5(10) and (11).

<sup>47</sup> With members drawn from the Planning and Development Department, the Building Department, and the City's project manager for the underlying urban renewal area. See Hamilton Canal District FBC, Section 10.3.5(2).

Permit review under the Massachusetts State Building Code.<sup>48</sup> Great care is taken in this form-based code not to usurp or infringe the Building Inspector or Building Commissioner's zoning enforcement role under state law.<sup>49</sup> Thus, the operative provision – a new Section 10.3.5-8 of the Lowell Zoning Code – is framed as review and recommendation to the Building Commissioner that the commissioner then acts upon, either by granting or denying the requested building permit, which evidences final zoning approval. And it is therefore the Building Commissioner's action in granting or denying the Building Permit application that becomes the appealable event under the code.<sup>50</sup>

In the foregoing sense, the Hamilton Canal District Form-Based Code demonstrates clearly the value in keeping within existing statutory roles and frameworks, even when moving dramatically away from the conventional zoning approach and into the arena of form-based codes. Attempting to do something else – making the review group the actual decision-making or permit-issuing body, for instance – would have required not only a state law modification or special exemption but also a new decision, administration, and appeal procedure that the City would have had to deal with. For example, without the Building Commissioner taking on the responsibility of issuance and therefore being invested in the outcome, how would the review group have enforced its decisions or monitored compliance? If the answer is that those functions would be handed back to the Building Commissioner, why take them away in the first instance?

## CONCLUSION

In a sense, the legal issues raised by form-based codes in New England and examined briefly here are not unique to form-based codes, though issues such as balancing back-end discretion against the limitations of mapping are perhaps thornier in form-based regulation. Overall, such issues were all well-recognized zoning and land regulation legal issues long before form-based codes entered the picture. The value in recognizing and examining them, given that the battle of establishing the state law validity of form-based codes has been won, is in the tendency of form-based codes to raise these issues when conventional zoning codes typically do not. This should hardly be surprising. The current statutory framework was built to foster development, adoption, and implementation of use-based zoning. It takes more thought and careful drafting to implement a form-based code through a statutory framework designed for a different regulatory approach. But it is not impossible, and as more codes are adopted in New England, the pathways to successful development, adoption, and implementation are getting more worn and recognizable as time goes on. Indeed, with new form-based codes in development in several more New England municipalities, including Burlington (VT), Sudbury (CT), and Damariscotta (ME), the stage is set for the region to keep moving forward.

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<sup>48</sup> *Id.* at Section 10.3.5(8).

<sup>49</sup> MASS. GEN. L. C. 40A, § 7.

<sup>50</sup> Hamilton Canal District FBC, Section 10.3.5(8)(f).