The Rocky Mountain Land Use Institute  
*Thirteenth Annual Conference*

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Session Handouts  
To Accompany Home Study Audio CD  

for  

**DEBATE**  

*Smart Codes: Just How Smart?*  
Original Presentation  
Thursday, March 11, 2004

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PRESENTER BIOGRAPHIES

Christopher Duerksen, Esq., is managing director of Clarion Associates of Colorado, LLC, a land use consulting firm with offices in Denver, Fort Collins, Chapel Hill, Chicago, Cincinnati, and Philadelphia. He has represented local governments, nonprofits, and the private sector in a variety of land-use and zoning matters and specializes in development code revisions, growth management planning, historic preservation, natural resource and scenic area protection strategies, airport-area development, and market development strategies. A co-founder of The Rocky Mountain Land Use Institute, Mr. Duerksen has written and spoken extensively on land use issues in Colorado and nationally. He has authored many books and articles on land use and conservation issues, including *Takings Law in Plain English, Aesthetics, Community Character, and the Law*, and *True West: Authentic Development Patterns for Small Towns and Rural Areas* and speaks extensively across the United States on those subjects. He is a former elected member of the city council in Fredericksburg, Virginia, and directed the Gateway/Stapleton Development Office for the City of Denver prior to joining Clarion.

Robert J. Sitkowski, Esq., is a lawyer in the Land Law Section of Robinson & Cole LLP in Hartford, Connecticut, where he concentrates his practice in representing private landowners and public entities in land use matters and in evaluating, drafting, and implementing zoning and planning regulations. In November 2002, he was recognized by the *Connecticut Law Tribune* as one of the State’s “New Leaders of the Law.”

Mr. Sitkowski is admitted to the practice of law in Connecticut and Pennsylvania. He has worked as a city attorney and an urban planner for local governments in Harrisburg, Pittsburgh and Mt. Lebanon, Pennsylvania, and, for five years before entering legal practice, he practiced architecture and urban design in Chicago and Pittsburgh.

Mr. Sitkowski is a member of the American Bar Association’s State and Local Government Law Section, the American Institute of Architects, the American Institute of Certified Planners, the Congress for the New Urbanism, and the National Association of Home Builders’ LANDS Network. He serves as Chair of the New Urbanism Subcommittee of the Land Use Committee of the ABA Section on State and Local Government Law. He is a member of the Board of Directors of the Connecticut Main Street Center and of the Town of West Hartford’s Design Review Advisory Committee. Mr. Sitkowski is a recipient of the American Planning Association, Planning and Law Division’s R. Marlin Smith Writing Prize.

He has written extensively about legal aspects of the New Urbanism and has spoken on this and other land use law topics at meetings and symposia of the Brookings Institution, the American Planning Association, the Seaside Institute, the Congress for the New Urbanism, the International Municipal Lawyers Association, the American Institute of Architects, and the American Bar Association.

Mr. Sitkowski received his B.Arch. in design from the University of Illinois at Chicago. He earned a Master of Urban and Regional Planning and a J.D. from the University of Pittsburgh, where he was awarded the Thomas Cooley, II Legal Writing Prize.
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WHAT MAKES AN INTELLIGENT CODE

1. USER FRIENDLY
2. COMPREHENSIVE
3. LEGALLY DEFENSIBLE
4. PREDICTABLE TIMEFRAMES/OUTCOMES
5. QUALITY, COMPATIBLE DEVELOPMENT
WHAT MAKES AN INTELLIGENT CODE

6. ENVIRONMENTALLY SENSITIVE DEVELOPMENT

7. FLEXIBILITY

8. BASED ON AND IMPLEMENTS COMMUNITY PLANS THAT REFLECT COMMUNITY VALUES AND GOALS

9. APPROPRIATE TO LEVEL OF COMMUNITY SOPHISTICATION AND RESOURCES

10. ATTUNED TO ECONOMIC/ MARKET FORCES
TRADITIONAL EUCLIDEAN ZONING

KEY FEATURES

- Uses segregated and disconnected
- Rigid dimensional standards—mathematical precision
- Limited development stds.
- Legalistic format—few illustrations, tables, or flow charts
- Not always tied to comprehensive plan
- PROSCRIPTIVE
Traditional Zoning

STRENGTHS:
• Predictability for applicants and neighbors
• Segregation of uses reduces incompatibilities
• Basic approach easy to understand

WEAKNESSES
• Inflexible re uses and dimensional standards—stifles creativity
• Questionable development quality and environment impact
• Not user-friendly
• Often lacks links to comprehensive plan
SMART CODES

KEY FEATURES

• Focus on building types and design

• Emphasis on control of the public realm

• Transect concept replaces traditional zone districts

• Reduced dimensional standards in urban zones

• Ample illustrations, tables

• PRESCRIPTIVE — dictates building types, design, public spaces and streets
SMART CODES

STRENGTHS:

• Predictable

• Closely linked to plan principles to guide regulations

• Strong design quality

• Well-illustrated

• Strongly encourages mixed-use development

• Short document
SMART CODES

WEAKNESSES

• Highly PRESCRIPTIVE — my way or the highway
• Process weak/ non-existent
• Linear, sequential view of natural systems/ environment
• Not user-friendly: no index, no pagination, erroneous cross-references, limited definitions
• NOT comprehensive— many uses not covered; weak environmental standards; county applicability??
• Unbridled discretion
• No standards/ allowances for rural development
• Serious legal issues— due process, takings
MODERN UNIFIED DEVELOPMENT CODE

KEY FEATURES

• Clear intent statements based on comp plan
• Consolidated zone districts supplemented with flexible districts (mixed use, PUDs)
• Well-illustrated, summary tables, paginated TC, detailed definitions
• Consolidated procedures; clear assignment of authority
• Administrative decision-making/ modifications of stds
• Dual system of quality stds— design/ environ.
• Menus vs. command/ control
• Development incentives
MODERN UNIFIED DEVELOPMENT CODE

STRENGTHS:

• Predictable procedures/outcomes, but some flexibility to encourage creativity
• Implements comprehensive plan
• Strong design and environmental quality
• User friendly
• Comprehensive
• Tailored to locality
• Legally defensible
WEAKNESSES

- Staff intensive process and can be costly
- Reactive and proscriptive
- Relatively time-consuming to draft/tailor
- Sometimes complicated and often lengthy
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Smart Codes: Just How Smart?

Thirteenth Annual Rocky Mountain Land Use Institute
March 11, 2004

Robert J. Sitkowski, Esq., AIA, AICP
Overview

• What is a Form-Based Code?
• What is the SmartCode?
• Legal Issues
Implementation Techniques

- Wholesale Rewrite Incorporating New Urbanist Principles
- Strategic “Intervention”
- Special Districts
  - Permissive “Parallel” Code (Floating)
  - Mandatory (Mapped)
Typical Contents of a Form-Based Code

• Regulating Plan
• Definitions
• “Urban”/ Building Envelope Standards
• Architectural Standards
• Streetscape Standards
• “Administration”
Building Envelope Standards

- Height
- Siting
- Elements
- Uses

The building shall be between 2 and 4 Storeys in height, except where otherwise noted on the REGULATING PLAN. Any parking structure w/in the Block shall not exceed the eave height of any building w/in 75 feet.

Any unbuilt REQUIRED BUILDING LINE (RBL) or COMMON LOT LINE shall have a STREET WALL built along it, between 6 feet and 15 feet in height.

The ground storey finished floor elevation of any residential unit shall be no less than 36 inches above the fronting sidewalk.

The first storey shall have at least 8 feet 8 inches in clear height.
Building walls should reflect the traditional materials and techniques of California’s Spanish Colonial Revival architecture. They should express the construction techniques and structural constraints of traditional, long-lasting materials. Simple configurations and solid craftsmanship are favored over complexity and ostentation in building form.
Architectural Standards

Configurations and Techniques

- **Walls**
  - Wall openings shall be "no more squat than square" (i.e. must be taller than wide).
  - Wall openings shall not span vertically more than one storey.
  - Wall materials shall be consistent horizontally (i.e. joints between different materials must be horizontal and continue around corners) except for towers, chimneys and piers.
Architectural Standards

WHERE CLEARLY VISIBLE FROM THE STREET

MATERIALS

- Windows of anodized aluminum, wood, clad wood, vinyl, or steel
- Window glass must be clear, with light transmission at the ground storey at least 90% and 75% for the upper storeys (subject to modification if necessary to meet Title 24 requirements)
- Specialty windows may utilize stained or opalescent glass
- Window screens shall be black or gray
- Screen frames shall match window frame material or dark anodized
- Doors of wood, clad wood, or steel (dark bronze)
The SmartCode

- Created by DPZ
- Available from Municipal Codes Corporation
- Transect as Organizing Principle
The Police Power

- The Fundamental Power, Inherent in the State, to Regulate to Protect the Public Health, Safety and Welfare

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

Delegation/Derivation of Power

- Be it by General or Specific Grant, the Power to Regulate Land Use Must be Specifically or Necessarily Implied from One or More Sources
- Derivation
  - Constitution
  - Charter/Home Rule
  - Enabling Legislation
Enabling Legislation

- Varies by State
- The Mechanism by Which the State Authorizes, or “Enables,” Local Government to Enact Land Development Regulations
- Many Modeled on the Standard State Zoning Enabling Act (SSZEA)
- Pennsylvania & Wisconsin Expressly Enable “TND”; Connecticut’s Village District Act
The Standard State Zoning Enabling Act

- U.S. Department of Commerce, 1922
- Model Law Drafted by Basset-led group
- Separation of Uses/Districts
SSZEA Features

• “Grant of Power”
  – Height, number of stories and size of buildings and other structures
  – Percentage of lot coverage
  – Size of yards, courts and other open spaces
  – Density of population
  – Location and use of buildings, structures and land for trade, industry, residence or other purposes.
SSZEA Features (Cont’d)

• The District Concept
• “Purposes in View”
  – “In Accordance with a Comprehensive Plan”
  – Lessen congestion in the streets
  – Secure safety from fire, panic and other dangers
  – Promote health and general welfare
  – Provide adequate light and air
  – Provide overcrowding of land
  – Avoid undue concentration of population
  – Facilitate adequate provision of public requirements
SSZEA Features – “Purposes in View”

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.
Design Guidelines

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

Design Guidelines

• Usually Advisory Only

• Problems with Precision
  – Buildings and structures shall be made compatible with adjacent buildings of conflicting architectural styles by such means as screens and site breaks, or other suitable methods and materials
  – Harmony in texture, lines, and masses shall be encouraged
    • Anderson v. Issaquah, 851 P.2d 744 (Wash. App. 1993)
The Discretion Continuum:
The Regulator’s View

Flexibility

Prescription
The Discretion Continuum: The Applicant’s View

Arbitrary Decision-Making

Objectionable Incursion on Property Rights
Legal Issues

• Constitutional
  – Due Process
    • Substantive
      – “Aesthetic” Regulation
    • Procedural
      – Vagueness
  – Equal Protection
  – First Amendment

• Administration
Other Legal Issues

- Compliance w/Federal Statutes
  - FHAA
  - TCA
  - RLUIPA
- Uniformity
- Nonconformities
- Vested Rights
Due Process: Substantive

• A Land Use Regulation Must Advance a Legitimate Public Purpose and the Regulation Must Be a Reasonable Means to Achieve that Purpose
“Aesthetic” Regulation

- Majority Post-*Berman* View: Legitimate Public Purpose
- Minority View: “Aesthetics Plus”
- “Look-Alike”/“Anti-Look-Alike” Issues
  - Compatibility
Columbia Pike - Architectural Standards

Tradition

• These standards favor an aesthetic that is traditional in a broad sense. They specify an architecture language of load-bearing walls and regional materials. The standards also specify certain details, such as column and pier spacing, window proportions, roof or cornice configurations, storefronts, and overhangs.

• The intent behind these standards is to utilize a discipline of form when designing new buildings in order to foster a coherent Columbia Pike aesthetic.

• All building materials to be used shall express their specific properties. For example, stronger and heavier materials (i.e. masonry) support lighter materials (i.e. wood).
Equivalent or Better

- While only materials, techniques, and product types prescribed here are allowed, equivalent or better practices and products are encouraged. They shall be submitted to the Administrative Review Team and may be added to the approved list after proper review by the County.
Due Process: Procedural

- A Land Use Regulation Must Be Administered Fairly
  - Arbitrary and Capricious Act
  - Compatibility Standards
  - Void for Vagueness Doctrine
The County may grant exceptions to the Form-Based Code based on unique and extreme topographical or landscape conditions and significant existing deciduous trees. Any such exception must be submitted for and approved in writing. The granting of an exception does not constitute a precedent for other applications, and such requests may be arbitrarily denied.
Hercules

Design Review Findings

d. General architectural considerations, including the character, scale and quality of design, the architectural relationship with the site and other buildings, building materials, colors, screening of exterior appurtenances, exterior lighting and signing, and similar elements have been incorporated in order to insure the compatibility of this development with its design concept and the character of adjacent buildings.
Equal Protection

- Government Must Treat Equally Like-Situated Applicants
“Where Clearly Visible from Street”

Many requirements of this Code apply only where the subject is “clearly visible from the street.” Note that the definition of Street includes Squares, Civic Greens, parks, and all public space except Alleys. A building element more than 30 feet from the RBL/Street (such as items facing a Common Lot Line more than 31 feet away from a RBL and/or Street) is by definition NOT Clearly Visible from the Street. Also common and/or party walls are by definition NOT Clearly Visible from the Street.
First Amendment

- Government Action Cannot Dictate Content of Speech, but Can Regulate Time, Place and Manner
- Where Does It Come Up?
  - Signs
    - Lanham Act
  - Religious Land Uses
    - RLUIPA
  - Architectural Expression of Landowner
    - Prior Restraint Doctrine
Columbia Pike

Intent and Guiding Illustrations for Building Walls

Building walls should reflect and complement the traditional materials and techniques of Arlington County’s regional architecture. They should express the construction techniques and structural constraints of traditional, long-lasting, building materials. Simple configurations and solid craftsmanship are favored over complexity and ostentation in building form and the articulation of details. All building materials to be used shall express their specific properties. For example, heavier more permanent materials (i.e., masonry) support lighter materials (i.e. wood). The illustrations and statements on this page are advisory only. Refer to the Code Standards below for the specific prescriptions of this section.
Administration

• Applicant: Entitlements
• Regulators: Implementation
• Procedures:
  – Should be predictable for Applicants and Regulators
  – Variances Based on Architectural Merit
TOWN ARCHITECT

The Town Architect is an area locally based Urban Designer, familiar with New Urbanist principles and with the Pleasant Hill BART Station Property redevelopment, who will work with prospective tenants to show how the BART Station Property can satisfy their site needs in a cost efficient manner. The Town Architect will work under the direction of the County and will assist the developer, tenants, BART, and the County in achieving the goals of these Codes in a cost effective manner. The Town Architect will make recommendations to the Community Development Department prior to and including consideration of Final Development Plans or modifications and to the Zoning Administrator prior to issuance of building permits.
Issues

- Transition from Private to Public
- Application to Built Condition
- Prescription/Vagueness