



Michigan State University Extension
Land Use Series

Form Based Codes and Michigan Zoning Enabling Act

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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. More about the styles of zoning can be found in Appendix A. This pamphlet is to discuss form based zoning's legal application under Michigan's zoning enabling statutes.

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 the former 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.

“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.

“Thirty seven million acres is all the Michigan we will ever have”

William G. Milliken

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

This is a fact sheet developed by experts on the topic(s) covered within MSU Extension. Its intent and use is to assist Michigan communities making public policy decisions on these issues. This work refers to university-based peer reviewed research, when available and conclusive, and based on the parameters of the law as it relates to the topic(s) in Michigan. This document is written for use in Michigan and is based only on Michigan law and statute. One should not assume the concepts and rules for zoning or other regulation by Michigan municipalities and counties apply in other states. In most cases they do not. This is not original research or a study proposing new findings or conclusions.

This would include the former P.A. 183 of 1943, as amended, (being the County Zoning Act, M.C.L. 125.201 *et seq.*) and the former P.A. 184 of 1943, as amended, (being the Township Zoning Act, M.C.L. 125.271 *et seq.*) in Michigan. All three of these old statutes were repealed, effective July 1, 2006. Although many current zoning enabling acts embody substantial changes from the Standard Act, the majority retains its substance. In Michigan 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 plan³

² Section 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).)

³ Section 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, 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 “based on a plan” requirement is even more important given the Michigan Planning Enabling Act of 2008.⁶ 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, buildings, and structures that may be erected or altered, including tents and recreational vehicles.⁷

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:

⁴ Section 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).)

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

⁶ Sections 33 and 31 of P.A. 33 of 2008, as amended, being M.C.L. 125.3801 *et seq.*

⁷ Section 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).)

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.⁸

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

Finally, M.C.L. 125.3201(3) 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 . . .⁹

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 use.¹⁰

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

⁸ Section 201(2) of P.A. 110 of 2006, as amended, (being the Michigan Zoning Enabling Act, M.C.L. 125.3201(2)).

⁹ Section 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).)

¹⁰ *Yankee Springs Township v Fox* 264 Mich App 604; 692 NW2d 728 (2004)).

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.¹¹

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

¹¹ *Conlin v Scio Township* (262 Mich App 379 (2004)), the Michigan Court of Appeals.

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 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.¹²

¹² Section 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).)

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.

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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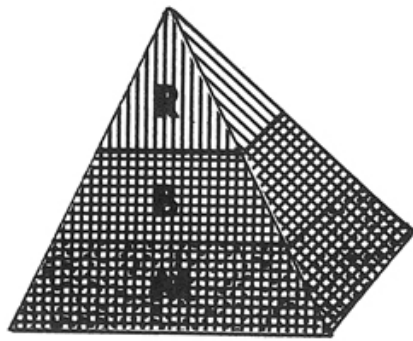
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Appendix A: Types of Zoning Ordinances, including Form Based Code.




By Kurt H. Schindler, AICP, for Citizen Planner

The zoning ordinance, map and text, can take on several different types or styles. Zoning ordinances can be categorized as traditional zoning, conventional zoning, performance-based zoning, form-based zoning or a mix of the types.

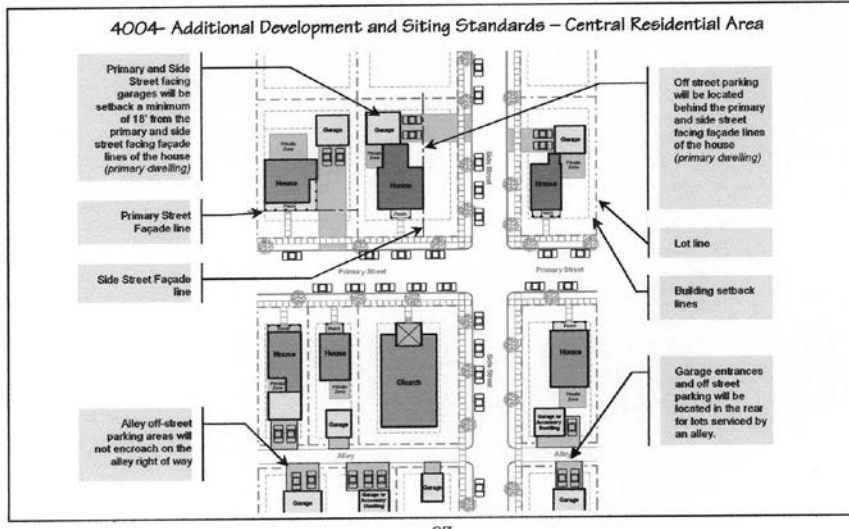


Traditional zoning is also known as pyramid or Euclid zoning, named for the U.S. Supreme Court case *Village of Euclid (Ohio) v. Ambler Realty Company* where zoning was upheld as a valid government police power. In traditional zoning, each zoning district builds on the previous one. For example, an R-1 Residential may allow dwellings and duplexes. The R-2 Residential allows everything in R-1 plus apartment buildings. The C-1 Commercial district allows everything in R-2 plus retail and service establishments, and so on. One might illustrate this with a pyramid, with R-1 at the top, and under it, slightly larger, is R-2, and then C-1 forming the wide base. Largely fallen out of use, this type of zoning is not seen much anymore.

Conventional zoning, by far the most common type of zoning found in Michigan, divides communities into separate exclusive zoning districts. A major characteristic is the segregation of land uses into separate areas. This type of zoning results in neighborhoods without a mix of commercial or other land uses, and may result in neighborhoods with all dwellings built for a single income bracket. More recently, this type of zoning has been modified to allow a mix of uses (especially in commercial areas) and to include some form-based zoning elements.

 Commercial	 Big Manistee River Corridor
 Highway Commercial	 Forest Production
 Developed Residential	 Natural Area
 Residential	 Wetland Conservation
 Rural Residential	

Performance-based zoning focuses more on the impact of a land use rather than the actual use. For example, a residential district may allow any type of land use when the external impact of that use is basically the same as the typical use for that district. Therefore, if a person wants to open a corner store, that store must meet the zoning ordinance set of standards. If the store meets the standards, indicating the store's impacts are the same as those of a 10-unit apartment building (traffic generated, amount of sewage, noise or other impacts), then the store will be permitted. The formula and system for measuring impacts can be complex but effective if done right.



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Form-based zoning focuses more on the form of the activity rather than the land use. This type of zoning emphasizes the form of the building and its relation to the public realm (street, park, etc.) It allows for broad and general land use. However, the outline of the built-form of buildings, parks and streets has priority. This type of zoning plan includes many drawings and illustrations, relying on illustrating the regulations with minor use of annotations. The Form-Based Codes Institute

advocates this newest type of zoning (<http://www.formbasedcodes.org/>). Form-based zoning is particularly effective in urban settings and for adoptive re-use of buildings, faster approval processes, placemaking, and so on. Because it is new and from a national initiative, the names and parts of the code do not align with the terminology found in the Michigan Zoning Enabling Act (MZEA). A rough equivalency of those terms follows:

- Form-Based Code (FBC) (national) = Form-based zoning (Michigan MZEA equivalent)
- Illustrative Plan = map in the master plan
- Regulating Plan = zoning map (but drawn with different features and emphasis)
- Mandatory FBC = the zoning district, written as a FBC, must be followed
- Optional or Parallel Code = a Planned Unit Development handled as an administrative decision (special use) or handled as a special use permit. The applicant has a choice to follow conventional zoning or the FBC. The FBC might be the permitted use option while the conventional zoning would be the special use/PUD option, or visa-versa.
- Floating zone = (no equivalent, cannot be done in Michigan). Might be handled as a zoning amendment PUD

Form-based zoning is still new for Michigan, but it has been put into practice in about two dozen communities in the state.

Finally, a zoning ordinance may contain a mix of the above zoning types. For example, in a conventional zoning ordinance, one zoning district might be prepared in the form-based approach. Or a conventional zoning ordinance may be retrofitted to have form-based elements, but still written in the conventional style. Another example would be a combination of performance-based zoning with conventional or traditional zoning.