

# Zoning problems are not consistent with the Constitution

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Randy Bright

I want to make something perfectly clear about form-based codes (FBCs), especially the kind that Tulsa looks likely to adopt – there is nothing wrong with them as long as compliance with the codes are voluntary.

The more I study and read about FBCs and New Urbanism, the more I am convinced that there are serious constitutional issues that are being overlooked in this nationwide drive by cities to convert their zoning and city planning to an outcome-based system of codes. Among those leading the charge are those who believe that a form-based code should be enforced so as to achieve a “vision” or as one author calls it, a “desired urban form”.

Their attitude is, what the public sees, the public owns.

Suppose you own a building on a main street for which a certain design motif – a “vision” or a “streetscape” – has been designated by the new zoning code, and you’ve decided to remodel your building. But your property has been effectively rezoned, so you’re told that you will only receive a permit if you build something that conforms to the requirements of the new code. That will include constructing a new building up to the “build-to” line (near the street), that it must contain a certain number of stories, its first floor ceiling must be so many feet high, and its front must contain certain architectural features. Your architect will be allowed the freedom to use some creativity, of course, as long as the design conforms to the look that the planners want to achieve, which may be little freedom at all, at least for the building facade.

In addition, that parking lot that used to be in front of your building? Well, now it needs to be moved into the back, perhaps accessible only by a narrow alley between buildings, but this is necessary to create the pedestrian-friendly streetscape at the front of the building.

Not to worry, we’ll just put an extra entrance to your business at the back, next to the parking lot, which creates the need for two reception areas instead of one (one in the front, one in the back). But perhaps the code won’t allow that, so your customers will have to walk from the back of the building through an alley to the front of the building, where they can walk and enjoy the streetscape along with all the other pedestrians.

Again, not to worry, because the code won't allow you as many parking spaces as you used to have. That will be great for business, especially during the Christmas shopping season.

I admit my example is a bit tongue in cheek, but it's made to prove a point – for many Americans, giving up freedom in order to get something “free” has become perfectly acceptable, demonstrated, for example, by entitlement-minded citizens who believe that health care should be free.

Similarly, there are those who believe that the public has a right to public spaces, public spaces that are formed by the front of your building, that has been placed where you were told to place it, and has been designed how you were told to design it. It's like building a movie set that imitates a quaint little street somewhere in Europe.

Parenthetically, I find it curious that we are devising codes that will re-create these little European villages that were so friendly, so walkable, so compact, and so socially acceptable, when there were no codes in medieval days to cause them to be as they were. European villages were built compact for very practical reasons, one of which was that everyone had to walk everywhere. Once transportation changed, cities naturally changed with them.

To the greater point of this article, which was whether or not FBCs are constitutional, I ask you to consider this statement again – what the public sees, the public owns - and ask yourself, should I be required to do more than I need in order to fulfill someone else's vision of a streetscape? Should I be forced to make my building conform to that image, despite what my own vision for my building is? Should I be required to spend a great deal more money than is necessary in order to satisfy the public's perception that I owe them this image? Should I lose the right to own and control my property as I see fit?

Church people – you need think about this as well, because at some point this idea that what the public sees, the public owns will be extended to your building. Are you going to be willing to make your church look less than a church, perhaps even nondescript, so that your building isn't out of conformance with the “vision”?

If a developer wants to build a complex that has a certain image, and the people who buy into the development agree to all the rules, no problem. And I don't disagree that some regulations are necessary to protect property rights. But it seems to me that everything I have just described should raise more than a few constitutional eyebrows.

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Randy W. Bright, AIA, NCARB, is an architect who specializes in church and church-related projects. You may contact him at 918-582-3972, [rwbrightchurcharch@sbcglobal.net](mailto:rwbrightchurcharch@sbcglobal.net) or [www.churcharchitect.net](http://www.churcharchitect.net).

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