

ZONING PRACTICE

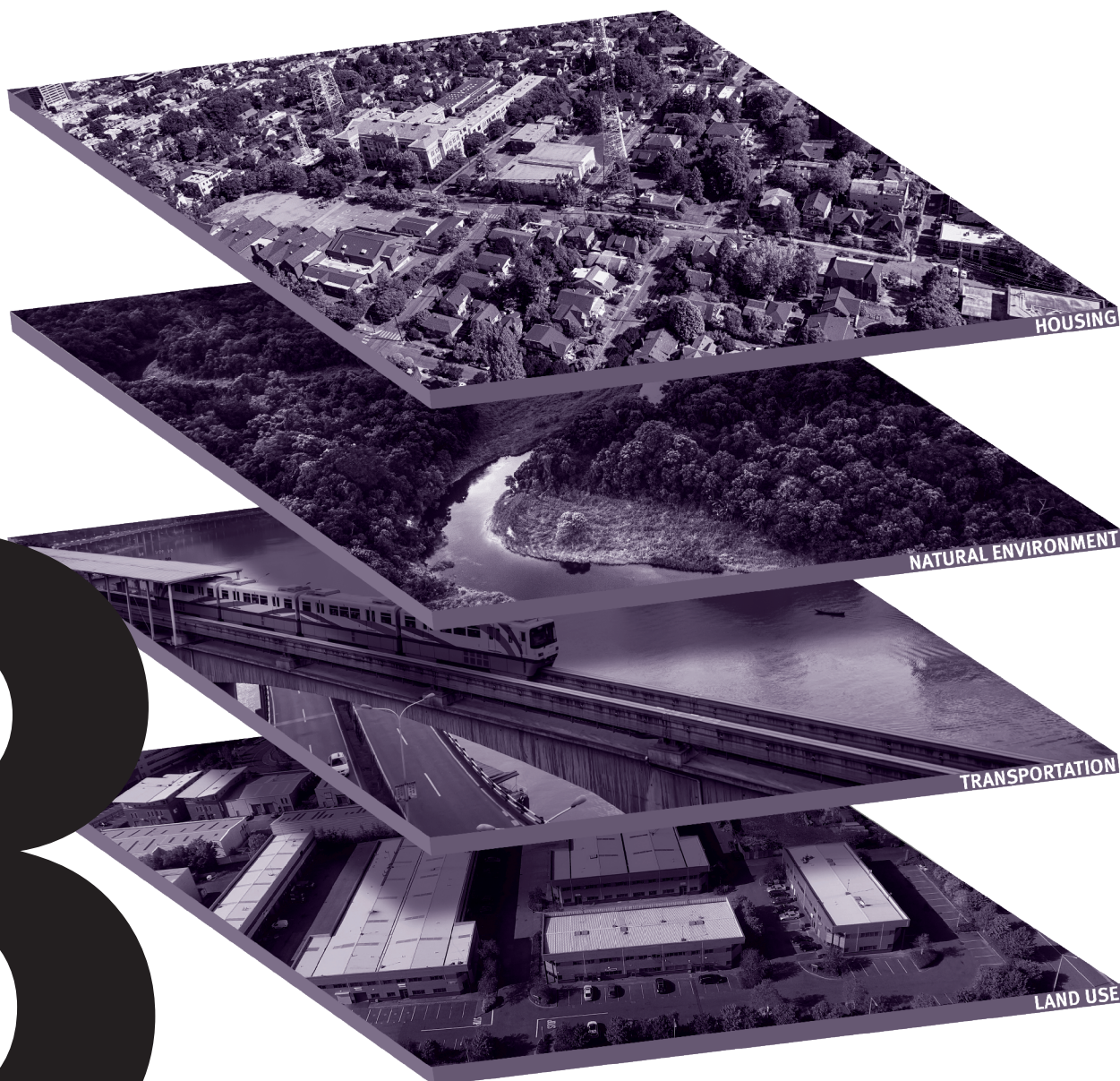
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PRACTICE PLAN IMPLEMENTATION



The Effect of Zoning Systems on Plan Implementation

By Lane Kendig

The local comprehensive plan is a vision or guide to the future development of a jurisdiction. Zoning is a law or code that controls how a parcel of land may be developed. From its inception, zoning was intended to be a primary tool for implementing comprehensive plans. In fact, the only other implementation tool universally available to local jurisdictions with the authority to adopt comprehensive plans is public investment.

Zoning is not omnipotent; it cannot implement plans for which there is no market. For example, a plan can identify new roads or parks, but zoning cannot make property owners or developers initiate projects that would necessitate building these facilities. If private actors are unwilling to help implement local plans for new public facilities through site development projects that include public dedications, the jurisdiction must condemn land and make improvements using tax money. Zoning existing parks as open space is legal. Telling a landowner that his or her property can only be developed as a park will not sustain a legal challenge.

When New York City adopted the first zoning code in 1916, comprehensive plans were spatial visions of the future community, designating where different land uses and streets should be placed. Provided the zoning map and standards were identical to the plan map, the implementation process was straightforward. Comprehensive plans today address a wider range of topics. State enabling laws often require a number of plan elements, such as land use, the environment, housing, transportation, economic development, infrastructure, health, growth management, and coordination with other governments. Plan implementation requires regulations that go beyond land use and intensity, not to mention public investments and a lot of voluntary coordination and action by a wide range of community stakeholders.

Conceptually, there are four distinct zoning systems: Euclidian, conditional, performance, and form based. Each system has at least one unique feature and represents a different approach to plan

implementation. However, in practice, the majority of contemporary zoning codes are a blend of Euclidian and conditional; others incorporate elements of multiple systems.

This article describes the defining characteristics of each zoning system and evaluates how these characteristics affect plan implementation.

ZONING SYSTEMS

All four systems share three common elements. They all have maps that divide the community into districts; the districts have some listing of permitted uses, and each district has a maximum intensity. Beyond this they differ in their approach to plan implementation.

Euclidian Zoning

Euclidian zoning dates to the New York City zoning resolution of 1916. The name Euclidian comes from the U.S. Supreme Court case *Village of Euclid v. Ambler Realty Co.*, in which zoning was held legal. In each residential district intensity was defined by a single housing type with a minimum lot size, lot width, setbacks, and maximum height, creating a rigid lot size and shape and a proscriptive building envelope, which limited design. Nonresidential intensity was originally dictated by setbacks and height. Newer ordinances use a floor area ratio. The provisions establishing permissible uses and intensity regulations by zoning district were inflexible but simple to understand: A use was permitted or not, and lots had to meet the minimum standards.

A prime objective was the protection of residential uses from those having significant nuisance potential, achieved by placing nuisance uses in separate zoning districts. The underlying assumption is that a Euclidean zoning code will be an effective comprehensive plan implementation tool if the zoning map is consistent with the future land-use map.

Conditional Zoning

Conditional zoning evolved from Euclidian zoning to overcome the rigidity problem.

Communities wanted or needed flexibility in two areas. First, some necessary uses could adversely affect residents and could not simply be relegated to a “high-impact” zoning district. The second need was to provide for more flexible site and building design. To address these desires for flexibility, conditional zoning retains the concept of district-based use permissions and proscriptive intensity standards and incorporates two new zoning techniques: the conditional use and the planned unit development (PUD).

A conditional use is a land use that may be permissible in a certain zoning district provided the specific physical and operational characteristics are compatible with its context. Conditional uses require a public hearing after which the zoning board could approve, approve with conditions, or deny a development application. The conditional approvals are intended for uses like major utilities, landfills, or mining that are needed in the community but have great nuisance potential. The process of conditional approval allows the community to evaluate the suitability of a site or to impose conditions to mitigate the nuisances. Over the years, officials liked the power of decision making, and common uses like gas stations, fast food restaurants, and apartments were made conditional uses.

A PUD is an alternative compliance mechanism that allows an applicant to request site-specific use permissions and intensity standards for a parcel of land under unified control. The greenbelt towns of the 1930s had demonstrated that clustering residences on a development parcel and leaving large areas as open space was superior to cookie-cutter site plans. Nevertheless, the rigid minimum lot size requirements of Euclidian ordinances did not permit creative design approaches like clustering. Adding a PUD option to the zoning code allows a zoning board to alter the permitted uses or housing types and change other requirements after a public hearing. As with conditional uses, the zoning board can approve, approve with conditions, or deny a

proposal. The approved site plan and other documents control the development.

While the Standard Zoning Enabling Act, first published in 1924, authorized discretion in the strict application of zoning standards, conditional uses and PUDs did not become common until after World War II. Both conditional uses and PUDs often had subjective standards for approval, such as fiscal impact, impact on property values, and consistency with the local comprehensive plan. The procedure for approval was quasi-judicial, which in theory should produce rational, predictable, and consistent results. In practice the process can be unpredictable, adversarial, and political or, as Richard Babcock put it, a game (1966).

In a quasi-judicial process, decision makers should impartially weigh the quality of testimony from experts and concerns from numerous neighbors and citizens. In practice, the result is often a political weighing of testimony by the number of speakers rather than technical merit. Developers and their attorneys see the process as a negotiation. They often game the system by submitting an inflated development proposal so they have room to negotiate. In addition to its unpredictability, it is a lengthy and costly process.

The underlying assumption is that a conditional zoning code will be an effective comprehensive plan implementation tool if the zoning map is consistent with the future land-use map and if the hearing process for conditional uses and PUDs allowed the community, developer, or citizens to cite language from other elements of the plan to establish consistency.

Performance Zoning

Performance zoning is a by-right regulatory system designed to eliminate conditional approvals. It provides design flexibility by permitting all dwelling unit types in all districts and making planned developments permitted uses. It also establishes maximum intensity and minimum open space ratios for each use to better regulate site plans.

The concept of “performance” in zoning first appeared in Chicago with industrial performance standards for smoke, noise, and other pollutants in the 1950s. In 1973, Bucks County, Pennsylvania (where I was serving as chief of local planning), published *Performance Zoning*, a concept and model code using performance standards for all

development. The model code was designed to implement four recently adopted Bucks County plans: a growth management plan, a natural resource plan, a housing element, and a parks plan.

Bucks County’s model code also sought to address exclusionary zoning claims. The Pennsylvania Supreme Court was so frustrated with municipalities not permitting apartments and other dense housing types that, in 1968, state lawmakers incorporated a “curative amendment” process into the state’s zoning enabling statute (Municipalities’ Planning Code §609.1). The curative amendment meant that a development plan that failed the court test was approved. There were nearly 50 exclusionary housing zoning suits against the municipalities in Bucks County in 1973. By serving as consultants, Bucks County staff wrote plans and ordinances for local adoption as a strategy for implementing county and local plans.

Following this experience, I drafted a more comprehensive model code that added standards to address other planning objectives (Kendig 1980). I introduced buffer yards to improve protection from nuisances, modulation standards to accommodate variable site and building design within defined limits and minimize reliance on variances, and limited uses (i.e., uses permitted subject to conformance with objective use-specific standards) to largely eliminate the need for conditional uses. All performance codes replace purely land-use districts with community character districts that provide for three spatially distinct classes: rural, suburban, or urban, using eight character types (Kendig 2010).

The underlying assumption is that a performance zoning code will be an effective comprehensive plan implementation tool if the performance standards are aligned with the policy recommendations for growth management, resource protection, housing, transportation, and design, and if the zoning map is consistent with the plan map.

Form-Based Zoning

Form-based zoning, as the name implies, emphasizes controlling site and building design over a strict separation of uses. It replaces the Euclidean zoning map with a regulating plan map that designates zoning districts based on a rural-to-urban transect (i.e., transect zones) or street frontages (i.e.,

street frontage types). It establishes multiple permissible building forms for each transect zone or street frontage type and prescriptive dimensional and design standards (such as build-to lines, minimum and maximum heights, and massing requirements) for each building form. Furthermore, form-based zoning often ties use permissions to building form and may specify different permissible uses for different building floors (e.g., retail or personal service uses on the ground floor and residential uses on upper floors).

Architects developed the first form-based (zoning) codes as development plans for PUDs in the 1980s. Their goal was to replicate the built forms of traditional neighborhoods or small towns, with gridded street patterns and distinct architectural styles. Apart from the substantive differences described above, form-based codes rely, to a greater extent, on a graphic presentation of standards and regulations than do Euclidean, conditional, or performance zoning codes. They often use line-art cross sections or photographs to illustrate building forms, lot size, setbacks, height, or other lot standards. The graphics may depict streets, parks, lighting, and other design elements to provide detailed design standards and explain them to the public.

Form-based codes typically permit multiple housing types in each district and require vertical mixed use development in higher intensity districts. Uses are generally permitted by right. The prescriptive form controls are explicitly intended to produce predictable development outcomes, but this rigidity does not allow other design approaches. It is also important to note that the rural-to-urban transect does not accommodate campus-like site development, including industrial, office, or business parks. This type of development typically receives a “special district” designation with proscriptive intensity standards.

The underlying assumption is that a form-based code will be an effective plan implementation tool if the regulating plan map (i.e., the zoning map) is consistent with the future land-use map and if the form controls are aligned with the policy recommendations in any growth management, housing, or transportation plan elements.

MEETING PLANNING GOALS

How effective are the four zoning systems in meeting core planning goals, including

land-use consistency, community character enhancement or preservation, environmental protection, housing choice and affordability, nuisance protection, transportation choice and efficiency, growth management, and development design and quality enhancement? Beyond this, how do these systems stack up against other desirable regulatory goals, such as efficiency, certainty, and flexibility?

Given that there is no recent national model Euclidian or conditional zoning code, my analysis below is based on how those codes work in practice to achieve goals. My analysis of performance zoning is based on *Performance Zoning* and regulations in some 50 performance codes I've drafted. The *SmartCode* (version 9.2) serves as my basis of analysis for form-based zoning. In addition, I reviewed four hybrid model codes: Colorado's *Model Land Use Code for Municipalities*, Colorado's *Model Land Use Code for Counties*, Oregon's *Model Development Code for Small Cities*, and the *Louisiana Land Use Tool Kit* (which includes elements of all four systems).

Land-Use Consistency

Implementing the comprehensive plan for land use is done by making the zoning map consistent with the plan's land-use map. All four types regulate land use by district and consistency can be easily determined. Euclidian codes allow only a single residential lot size in a district and narrowly limit the nonresidential uses permitted in districts. Zoning changes represent a problem. Landowners have a right to request zoning changes and they are frequently granted. Consistency is clear when there is a direct equality between plan and zone maps. Many Euclidian and conditional ordinances have many more zoning districts

than plan land-use categories. Conditional zoning makes the problem worse because decision making in adversarial hearings may not provide consistency with the plan. Performance and form-based codes both benefit from having fewer districts, making a one-to-one relationship to the plan practical. The *SmartCode* does not address industrial and similar uses. The Oregon and Colorado model codes are a mix of Euclidian and conditional systems and have the same limitations as adopted codes of those systems. The Louisiana model code ties zoning districts to character areas, which may help with land-use consistency, but it does include conditional uses and PUDs.

Community Character Enhancement or Protection

The intuitive concept of community character can be translated into concrete spatial characteristics (Kendig 2010). Because Euclidian and conditional zoning codes are based on land use and proscriptive lot size and building envelope standards, they are not useful in predicting community character. Under these systems, many residential districts have no clear character but a mix of character elements.

Performance zoning uses allows for eight community character types—three urban, two suburban, and three rural. The *SmartCode* uses a transect to discuss character and has six districts. These districts roughly map to one rural, two suburban, and three auto-urban districts, using the performance zoning classification scheme. True urban character requires that buildings enclose space and have floor area ratios in excess of 1.0. With at-grade parking, even the tallest buildings will not to produce floor area ratios above 0.9 (see

table below). The problem is that as buildings increase in height the amount of surface parking area must increase, eliminating the sense of enclosure.

The *SmartCode* does not require structured parking, so nonresidential development can satisfy the code's requirements without ever attaining a true urban character. Without structured parking, the code's build-to lines simply produce a short street with squat, shallow buildings, surrounded by parking—which is not urban in enclosure or floor area.

The Louisiana code requires only 60 percent open space for its rural districts, which is inadequate to preserve either agriculture or forestry, and the natural district provides a maximum of one percent coverage but does regulate cutting vegetation. Its urban districts will be auto-urban with a maximum height of five stories. Even where structured parking is provided, its urban potential is limited. The Oregon code is similar to Euclidian, with no rural character. In Colorado both the municipal and county codes are similar to Euclidian in failing to address character, but have a rural large to very-large lot district.

Environmental Protection

Euclidian and conditional zoning generally restrict development in the federally designated floodplains and wetlands, but do not otherwise consistently include environmental protections. While the conditional use and PUD review processes of conditional zoning provide an opportunity to protect natural features, the results are unpredictable.

Performance zoning requires minimum levels of protection for a wide range of environmental resources. A mandatory site capacity calculation determines the amount of open space required on each site. Because performance zoning makes clustering a permitted use, resource protection is achieved without developers losing density. Resource protection is further enhanced by a density incentive for the provision of more open space.

The *SmartCode* does not address natural resource protection outside of the T1 district, which does not permit housing. The four model codes, Oregon, Colorado, and Louisiana provide no resource protection standards. However, the Colorado county model excludes some hazardous and flood-prone areas to be counted toward minimum lot area, and the municipality model allows

SURFACE VERSUS STRUCTURED PARKING

Floor-Area Ratio and Floors

Building Stories	Surface Parking			Structured Parking		
	FAR	Increase in FAR	Parking Coverage	Parking Floors	FAR	Efficiency*
1	0.472	-	53%	2	0.635	1.44
2	0.618	31%	69%	3	1.119	1.81
4	0.730	18%	82%	4	1.810	2.48
8	0.804	10%	90%	6	2.969	3.69
16	0.846	5%	95%	10	4.958	5.86
32	0.869	3%	97%	16	7.715	8.88
64	0.881	2%	99%	20	9.962	11.31

*Efficiency is the comparison of maximum FAR using structured parking with surface parking FAR.

limited clustering. The Louisiana code performs better than the others because it permits clustering.

Housing Choice and Affordability

Both Euclidian and conditional zoning have a history of litigation over exclusionary zoning. The zoning maps generally fail to adequately zone land for affordable housing types, forcing developers to request zoning changes to build affordable units. Conditional zoning does not correct the weakness of Euclidian codes and adversarial hearings often result in affordable zoning denied. However, a few contemporary conditional zoning codes include mandatory or incentive-based inclusionary affordable housing provisions. When these inclusionary housing provisions are mandatory (and not tied to bonus density), they can force developers to subsidize the affordable units by raising the cost of all other units in the development. Codes with inclusionary housing provisions increasing the floor area and height of buildings are better because they offset the cost by providing more units.

Performance zoning provides a multilevel approach to provide more affordable housing. All dwelling unit types are permitted in all districts, and clustering eliminates inefficiency. A series of other standards—including a bonus for more open space—increases smaller, more affordable housing types. In addition, there is a mandate to provide affordable housing, which includes a density incentive and provides rules for pricing affordable units that excludes land and infrastructure costs. The incentive provides additional density for both affordable and market units and thus does not require a subsidy by the developer.

Form-based codes generally allow a wider range of residential uses in each district. The *SmartCode* mandates 10 percent affordable housing for all “New Community” plans. There are no inclusionary housing provisions or incentives for affordable housing in the Oregon, Colorado municipal, or Louisiana codes. The Colorado county model provides for a mandatory 10 percent requirement.

Nuisance Protection

Euclidian zoning was based on the idea of protecting residential areas from nuisances caused by other uses by having different districts. Nothing prohibits a residential district adjoining a district with many nuisances. The

possibility of a zoning change means nearby vacant land can be rezoned. Many Euclidian and conditional zoning codes do include standards for noise, lighting, vibration, and other emissions. Through conditional uses and PUDs, conditional zoning codes provide additional opportunities to mitigate nuisances, but the results are unpredictable.

Performance zoning recognizes that nuisance problems occur at the boundaries of zoning districts and requires buffer yards at district boundaries protecting against a zoning change. Buffers are also required for some uses. The buffer yard standards are proportional to the nuisance potential between the districts. Performance zoning codes include standards for noise, lighting, vibration, and other emissions.

Form-based codes primarily rely on district-based site and building design standards to protect against nuisances and make no provision for industrial or other districts abutting a residential transect. Form-based codes do not include standards for noise, lighting, vibration, and other emissions. The Oregon and Colorado codes rely only on mapping and do not have industrial performance standards. The Louisiana code provides for buffers along boundaries between residential and some other districts, but does not provide noise standards or other controls to prevent nuisances.

Transportation Choice and Efficiency

Euclidian zoning does not address street patterns or design, relying on subdivision or other regulations for this. Some conditional codes include site access control standards for certain uses or provide street design standards for planned developments. Performance zoning introduces narrower streets for low-volume residential streets to reduce the amount of impervious surface and runoff, slow traffic, and reduce the percentage of land devoted to streets. Performance zoning contains access control standards to maintain traffic flows on arterials and collectors by reducing the frequency of possible turning movements. Form-based codes often include context-sensitive street design standards that devote space to sidewalks, bicycle lanes, and transit lanes, and they often rely on graphic standards combining street and building design elements. The Oregon code includes street design and access control standards. The Colorado municipal code provides street

layout and design standards and standards for sidewalks, multiuse paths, and trails. The Louisiana code includes street design standards, with graphics for all street and alley types but no access controls.

Growth Management

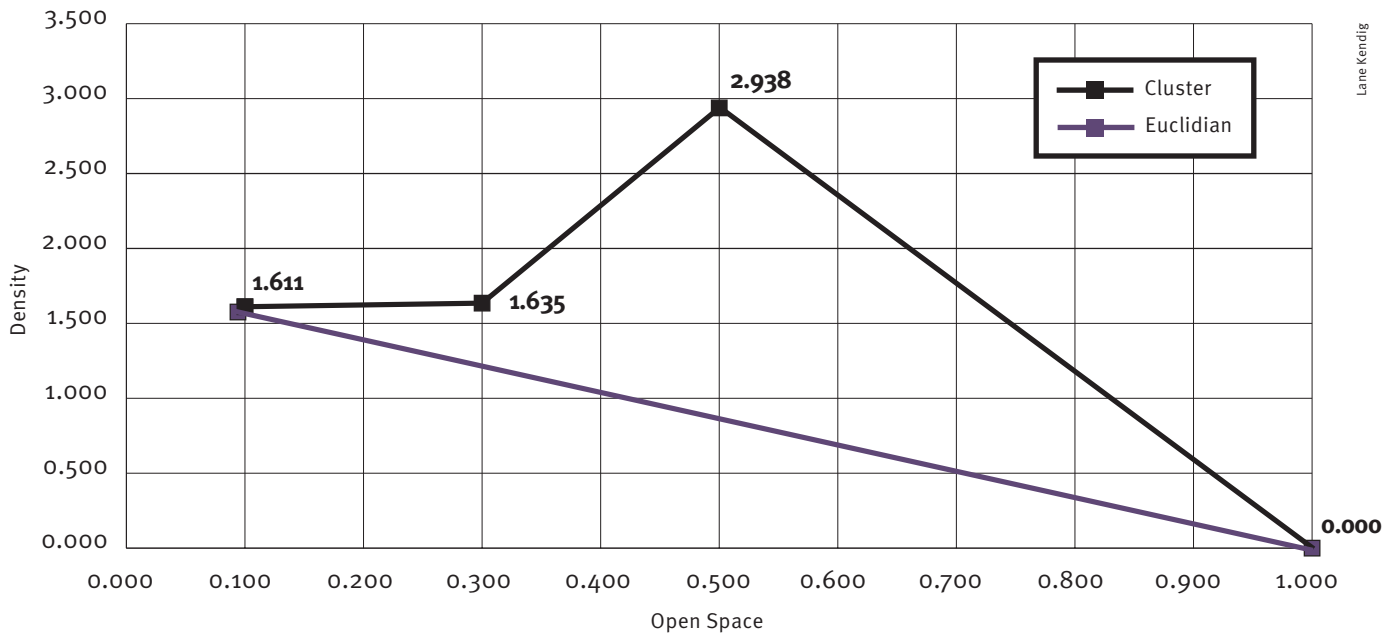
Some Euclidian and conditional codes attempted to manage growth or preserve rural areas. The most common zoning strategy they relied on to retard premature growth is one- to 10-acre minimum lot size zoning districts. This does not work and often increases sprawl. To preserve agriculture, zoning lots of 35 or more acres are occasionally used, but this generally fails because zoning changes quickly erode the protection. Some conditional codes permit transfer of development rights (TDR). TDR sounds like sure means of protection that avoids a taking, but it rarely works. (Kendig Keast Collaborative reviewed 68 TDR ordinances in 2008 and found that 81 percent of the land protected was achieved by three ordinances.) Many TDR regulations fail to protect any land because the system could not protect large rural areas and work economically.

Performance zoning uses extreme clustering as a primary tool to maintain rural areas to manage growth. Several subdivision forms are provided to allow limited initial development where utilities are not available but more intense development when utilities are provided in the future as another tool. The strongest growth-management strategies are traffic shed regulations that manage growth by limiting intensity to the capacity of rural roads on a pro-rata basis. This technique can be applied to other types of infrastructure. Additionally, performance zoning pioneered multijurisdictional ordinances to manage growth. Several performance codes use TDR successfully in conjunction with a development option that protects some portion of the protection area.

The *SmartCode* does not permit residential development in its rural T1 district and relies on TDR to avoid a taking. This TDR option is similar to many failed programs with no economic strategy.

The Oregon code does not address growth management, but it is designed for use by municipalities governed by Oregon’s state-mandated growth management system. The Colorado county code provides for a 35-acre rural lot size, but its exemption

COMPARISON EUCLIDIAN AND PERFORMANCE ZONING DISTRICT



Lane Kendig

➔ This chart illustrates the relationship between permissible density and open-space protection in eight jurisdictions located in seven states.

from subdivision regulations makes this a poor tool. The municipal code provides for agricultural districts where one additional dwelling may be permitted. The Louisiana code provides several agricultural districts but requires only 60 percent open space, which will not be adequate to preserve agriculture but provides residential development with a rural feel.

Development Design and Quality Enhancement

Apart from proscriptive building envelope standards, Euclidian zoning does not address development design and only a few ordinances address the quality of materials. Some conditional codes have design guidelines or standards for certain districts or development types. These generally require a design review committee. Planned developments and conditional approvals often consider design and quality of materials, but the results are inconsistent.

Performance zoning uses landscaping, resource protection, housing type design, and community character as the base control for design and quality. The requirement for average lot size, anti-monotony standards,

and urban streetscape standards are some of the additional design elements provided.

Form-based codes include prescriptive design standards for the siting of buildings and their massing. Architectural elements like porches, fences, or other architectural elements are often required, and in general, this tends to increase quality and cost.

The Oregon code includes illustrated community design standards. The Colorado county code is a Euclidian conditional use code where in planned developments design may be introduced with no standards. The Colorado municipal code includes design standards to address block diversity, and there are elements that provide examples but are not regulatory, such as the town pattern section. The Louisiana code includes prescriptive design standards for each building type and many landscape and street situations.

Other Plan Elements

Economic development, health, infrastructure, and recreation are plan elements in which zoning regulations have comparatively less impact because full implementation often requires government action. Thus, these plan elements are not reviewed.

Efficiency

Efficiency is a measure of whether a developer can achieve the maximum density of the zone. Euclidian and conditional zoning are rigid because of minimum lot areas and lot widths. This rigidity creates inefficiency (average 80 to 85 percent efficient). Conditional zoning has an additional problem—PUD approvals are unpredictable and can result in density being reduced due to public opposition. In addition to the rigidity, a variety of other factors can further reduce efficiency. Physical factors, such as a small development size, parcel shape, stormwater management requirements, or resources needing protection reduce efficiency by forcing larger lots and more street area per dwelling unit. The chart above demonstrates that any requirement requiring open space results in a loss of density in Euclidian or conditional zoning.

Performance zoning use of clustering provides greater efficiency and an incentive to provide more open space. The required minimum open space and maximum density addresses the open space. The chart compares the impact of open space on Euclidian and conditional zoning to the permitted cluster with and incentive for providing more open space. Form-based codes, while more flexible because more housing types are permitted in a district, can suffer the same inefficiency in addressing on-site conditions or open space.

For nonresidential use, efficiency is limited by parking. Without structured parking the maximum floor area achievable is less than 0.90. In Euclidian and conditional zoning structured parking mandates are typically found only in very large cities. The *SmartCode* does not prohibit structured parking, but unless it is voluntarily provided it cannot achieve urban efficiencies. While some conditional and form-based codes exempt nonresidential uses from off-street parking, this works only where there is existing public or private parking and a high level of transit access.

The Oregon code is essentially Euclidian in its approach to permissible density and has a section on calculating density. The Colorado codes suffer from the same problems as Euclidian and conditional codes. The Louisiana code allows some clustering but not in the urban district. The clustering is limited to fixed lot sizes so there will be sites with significant inefficiencies.

Certainty

A goal of zoning is to provide certainty about what can be built on a vacant parcel. In theory Euclidian zoning achieves this because uses in a district are limited. If zoning never changed, predictability would be ensured. But every landowner has a right to ask for a zoning change, and over time, both zoning map amendments and comprehensive plan amendments are normal.

Conditional zoning compounds the uncertainty problems of Euclidean zoning. Performance zoning provides certainty

with buffer yards providing protection even if zoning is changed. Form-based codes seldom address the problem of a transect district bordering a high nuisance district. Fewer districts in performance and form-based codes make zoning changes less likely. The Oregon and Colorado codes are similar to Euclidian and conditional codes. The Louisiana code uses buffer yards to protect against some zoning changes.

Flexibility

Flexibility is needed to allow developers to maximize the permitted use of their property. Euclidian zoning is the least flexible, to the point of forcing inefficient development. In theory, conditional zoning is more flexible and adaptable, but its unpredictable nature does not assure that flexibility will be achieved. Performance zoning permits clustering, which allows designers to work with site or regulatory constraints without losing density. It does not impose a preset design approach. In addition, performance zoning provides flexibility to deal with specific constraints without seeking a variance.

Form-based codes allow a mix of uses in most zoning districts but suffer efficiency problems on difficult sites and introduce rigid design standards. The Oregon and Colorado codes are hybrid Euclidian and conditional codes with the associated rigidity and unpredictability. The Louisiana code provides for increased flexibility for permitted uses but still retains a high number of uses requiring conditional approval.

SUMMARY

Euclidian and conditional zoning are both highly unpredictable for plan implementation. From its inception in 1973, performance zoning was based on a philosophy and process of writing standards to implement comprehensive plan elements. When a new planning problem or element arises, the performance approach requires new standards be written to solve it. Form-based zoning is an improvement over Euclidean and conditional zoning, but it is less efficient, certain, and flexible than performance zoning.

Stay tuned for a new model code, *Performance Zoning: The Tool to Implement Comprehensive Plans*, in 2019.

ABOUT THE AUTHOR

Lane Kendig is the founder of Kendig Keast Collaborative, a national planning firm. He has more than 45 years of planning experience, working for large and small cities, counties, and developers, including in Bucks County, Pennsylvania, and as county planning director in Lake County, Illinois. He is the author of the books *Performance Zoning* (1980), *Community Character*, and *Planning with Community Character* (both 2010).

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IS YOUR ZONING SYSTEM
A GOOD MATCH FOR YOUR
COMPREHENSIVE PLAN?

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