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PRACTICE LEGAL COMPLIANCE



11

Aligning Development Codes with the Law

By S. Mark White, AICP

If your community's land development regulations are old, encourage the wrong kind of development, or are riddled with legal land mines, you might consider updating them.

Communities update their regulations for these and many other reasons. And the practice of code drafting has changed dramatically over the past several decades. Advances in technology, a renewed emphasis on physical design and sustainability, and community empowerment have changed how communities approach a code update.

This article provides planners and zoning professionals with guidance about the legal issues to consider when drafting a development code. This includes tips about how to put the code together in a way that considers issues of statutory authority and constitutionality. It also describes how to write in a way that avoids "legalese," while also putting your community in the best position to defend potential legal challenges.

WHAT IS A DEVELOPMENT CODE?

Development codes are regulations that apply to land use, design, or development. They are

comprehensive, addressing how property is used, the substantive regulations that apply to regulations, the procedures for entitlement, and how to protect existing rights. These range from conventional zoning regulations (which regulate how property is used) to modern form-based codes (which regulate how buildings and public spaces are designed). This article uses the term *development code* to refer generically to all kinds of codes that regulate development. These include zoning codes, subdivision regulations, growth management ordinances, design-based regulations, environmental standards, and siting restrictions (see Table 1).

The key difference between development codes and other planning documents, such as comprehensive plans, are that they are legal documents. Development codes are a community's legal authority to shape new development or redevelopment. In other words, they have the force of law. By contrast, plan policies

describe a community's vision for new development. However, they typically do not usually have the force of law. Even in states that have mandatory consistency (i.e., where codes, and sometimes even permits, must comply with comprehensive plans), the plan policies are not individually enforceable. They require a regulatory framework for implementation. For example, in cases where state law prohibits rezoning in a way that conflicts with a comprehensive plan, what is enforced is not the plan policy. The legal enforcement tool is the zoning code.

WHAT'S IN A CODE?

A complete development code should communicate the standards that apply to development, how to get projects entitled, and what to do if an applicant believes the local government made an erroneous decision. To accomplish these objectives, it typically includes the elements in Table 2.

LEGAL CHECKLIST

Like it or not, a development code is a legal document. While it does not have to be written in "legalese" (more on that topic later), it needs to meet certain requirements in order to be legally enforceable. First, whatever your community regulates must find some source of authority either in the state constitution, state legislation, or both. Second, your code must comply with state and federal barriers and restrictions on regulation. While development regulation is typically a local matter, Congress has established some limits on local regulation. Examples include fair housing, telecommunications (cell towers), and religious-land-use regulation. And if a community wants to participate in the National Flood Insurance Program, it must adopt floodplain regulations



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➡ Many contemporary development codes include standards that control building and site design.

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About the Author

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TABLE 1. CODE TYPES

Code Type	What It Regulates
Zoning codes	Use and dimensional characteristics (like setbacks, building height, density, and coverage).
Subdivision regulations	The division of raw land into lots. Regulations include lot design, infrastructure design and capacity (such as streets, water, and sewer), and off-site infrastructure mitigation.
Growth management systems	The timing or impact of development. For example, a regulation may limit the number of permits issued per year or tie development approval to the capacity of off-site facilities (like roads or schools).
Design-based regulations (such as form-based codes)	The physical form of development, such as building orientation and fenestration (i.e., windows and entryways), street design, civic spaces, and the overall relationship between buildings, streets, and blocks.
Environmental standards	The environmental impacts of development, such as stormwater management, air quality, noise, vibration, odor, or similar characteristics. This can include tree preservation regulations.
Site location regulations	The location of highly intensive uses or activities, such as landfills and hazardous waste facilities. These usually include standards such as setbacks, how the facility is operated, or mitigation requirements.
Hybrid codes	A combination of any of these regulations—usually zoning and design-based controls.

that follow federal standards. States often have their own restrictions. Limits on group home regulations are common, and a growing number of states restrict local regulation of wind and solar energy facilities. Third, even if the regulations are authorized, they must respect constitutional rights. These include property rights, due process, equal protection, and free speech to name a few. Constitutional protections reside at both the state and federal levels. And state constitutions can grant more extensive rights than the federal constitution. Therefore, it’s important to consult both your state and federal constitutions when you write development standards, proce-

dures, and restrictions on the use or development of property.

In addition to enforceability, an improperly constructed code can create legal liability on behalf of the community. It is rare for the mere adoption or existence of a code to create legal liability. In other words, “facial” challenges to the constitutionality of the mere adoption of an ordinance rarely succeed and rarely create legal liability. However, the way a code is enforced can create significant legal liability. This could include damages and attorney fees. The processes and standards that lead to potential liability flow directly from the code’s language,

so it is important to audit the code carefully to ensure that actions taken under it respect constitutional rights.

STATUTORY ISSUES

Development regulations are usually a local government function. Under the “creature concept,” local governments (as state creations) must find their authority in state law. In some states (such as Kansas and Ohio), local governments can exercise any power not denied by state law. This is known as “home rule.” In others (such as Pennsylvania and Virginia), local government must find its authority to regulate in state statutes. In those states, local government has only that power expressly granted or necessarily implied by state law. This is known as “Dillon’s Rule,” and is generally considered a restrictive way to interpret local authority. Of course, each state has unique twists on authority. In Colorado and Missouri, some communities (such as charter cities) have home rule, while others (known in Colorado as “statutory” cities) are subject to Dillon’s Rule. In North Carolina, the state legislature abolished Dillon’s Rule by providing that local authority is broadly construed. However, recent court decisions have eroded this authority by overturning regulations that were not expressly recognized in state law, without attempting to find implied authority.

Overlaying authority is the doctrine of preemption. Whether you are in a home rule or Dillon’s Rule state, local government cannot prohibit things the state allows or allow things the state prohibits. In addition, if state regulation is pervasive it may “occupy the field,” that is, leave no room for local regulation. This commonly arises when local governments establish environmental regulations that mirror or duplicate state regulations. If the regulation supple-

TABLE 2. CODE ELEMENTS

Code Element	What It Does	Legal Requirement or Justification
Introduction	Explains the basis for the code (for example, the comprehensive plan), legal authority, and who the code applies to.	The policy basis typically comes from the comprehensive plan. The plan provides the justification for the code’s standards and processes and creates a blueprint for the code’s structure. Basing a code on a comprehensive plan is a good way to ensure that it is not arbitrary and capricious. If part of the code is challenged as irrational, excessively burdensome, or lacking legitimate public interest, the community can point to the plan as the basis for its actions.
Districts	Establishes permitted uses and development standards by district.	This is the most basic and well-established authority to regulate land development in most states.
Procedures	Provides the steps to entitle a project, establishes what kind of decision is made, who makes it, and what it gives the applicant the ability to do.	Incorporates due process protections and public notice.
Standards	Establishes the standards by which development is approved, disapproved, or conditioned.	Gives property owners notice of what is required to develop their property.
Nonconformities	Protects applicants who have preexisting rights that conflict with the existing regulations.	State land development statutes and property rights law requires local governments to recognize existing development rights.
Definitions	Provides a glossary of terms and phrases used in the development code.	As with the standards, provides notice as to the meaning of language used in the code.

ments state law, it may survive a preemption challenge. However, if it makes compliance with state regulations impossible, preemption is an issue. In addition, planning and zoning enabling legislation may say how zoning regulations are adopted and place limits on their scope, even where it does not furnish the local government’s source of authority. In an interesting twist, Georgia grants local government zoning authority directly in the state constitution, but allows the state to control zoning procedures. This means that the state cannot take zoning authority away from local governments but can require notice, hearing, and related procedural requirements. Therefore, even in home-rule states, it’s important to carefully review the state constitution and statutes—and the cases that interpret them—when crafting local development regulations.

CONSTITUTIONAL ISSUES

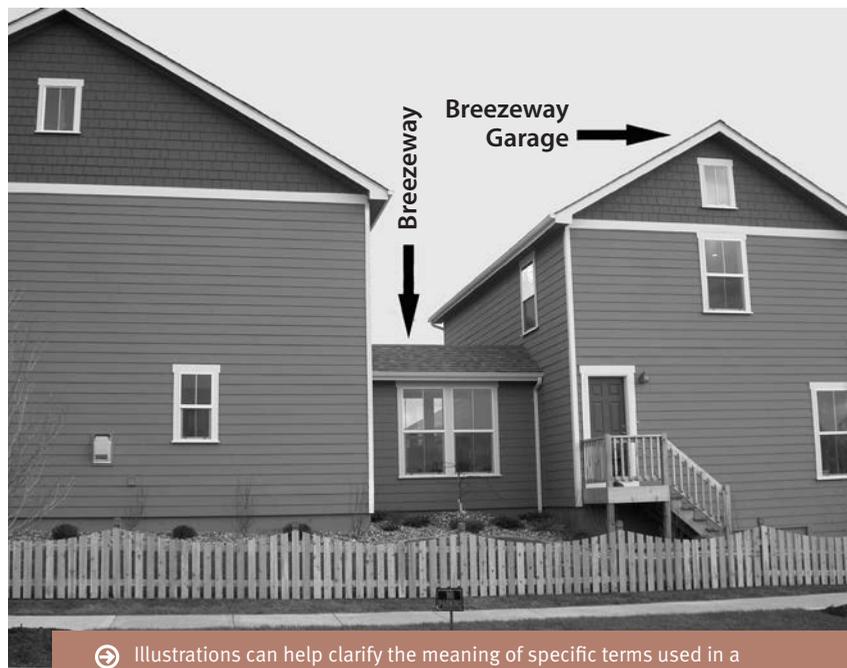
There are four major constitutional issues that may affect the legality of a development code: due process, equal protection, takings, and the First Amendment.

Due Process

Under the Fifth and Fourteenth Amendments, people are entitled to due process when a regulation affects their property. There are two kinds of due process: substantive and procedural. *Substantive* due process requires your

regulations to have a reasonable relationship to a legitimate public purpose. Courts are very deferential to a local government’s policy decisions and their determination of how effective a regulation is likely to be. For that reason, substantive due process challenges to regulations rarely succeed. *Procedural* due process

requires that regulations give people notice and an opportunity to be heard when a regulation is applied to them. This does not apply to legislation, although most zoning and land development enabling statutes require notice and a hearing before a regulation is adopted. While most due process cases relate more to how a



➔ Illustrations can help clarify the meaning of specific terms used in a development code.

code is administered than how it is written, the procedures section should guide local planning agencies about how to notify persons of hearings and decisions, receive and consider evidence, deliberate, and make a decision. In some communities, these requirements are set out in the agency's rules of procedure or separate procedural manuals or regulations.

Codes should have clear appeals processes. This protects applicants from arbitrary decisions and the local government from potential liability. Because applicants cannot generally sue local governments for the application of regulations until a final decision is reached, an appeals process gives the community an opportunity to work out a solution with an applicant before the issue winds up in court.

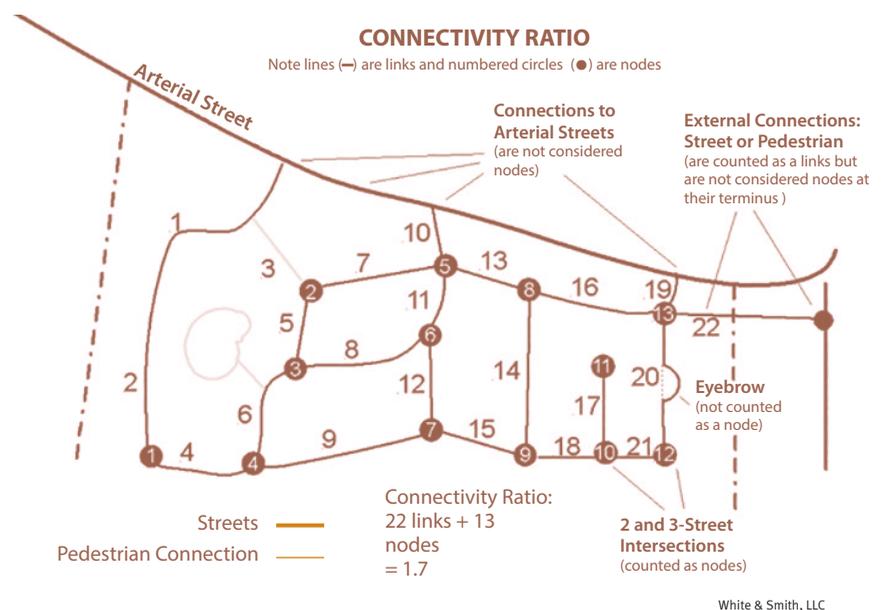
One important due process element is language precision. A code requirement must be clear enough that a person of reasonable intelligence can read it and know what's expected of them. Courts apply these tests to avoid arbitrary decision making or unfair favoritism or targeting of applicants. This standard is not applied with rigor for legislative decisions such as (in most states) rezonings, which are subject to separate legal tests (e.g., plan consistency, how long the property has remained vacant as zoned, or similar factors). Courts also tend to tolerate fairly imprecise language for discretionary decisions, such as conditional use permits or variances because the applicant typically does not have a well-formed entitlement claim at that stage of the permitting process. However, regulations that are administrative should, if possible, include fairly precise standards. If staff or administrators are given a discretionary, loosely written standard to apply, there should be a clear appeals process to avoid arbitrary action.

In addition to due process, language precision is important when the applicant and local government officials disagree about the meaning of a standard or requirement. Courts apply seemingly inconsistent principles in that situation. On the one hand, courts often defer to the interpretation given by the agency who administers the code. On the other hand, courts apply ambiguous language in a way that favors the free use of property. The lesson here is to avoid surprises by writing and illustrating your code as clearly as possible.

A trend in modern codes is to blend illustrations with text. Most codes provide that the text is binding if there is a conflict with

the illustrations. In addition, the text should clearly explain how the graphics are used. However, at least one case indicates that illustrations could clarify otherwise nebulous language. In *Anderson v. City of Issaquah*, 851 P.2d 744 (Wash.App. 1993), the court invalidated a set of design review board regulations as excessively vague. In a footnote, the court cited a set of design guidelines and standards from Bozeman, Montana, and San Bernardino, California, that were richly illustrated. The court noted that "[t]he illustrations clarify a number of concepts which otherwise might be difficult to describe with the requisite degree of clarity."

ferential treatment in regulations must have a legitimate public purpose. Usually, the community's decision is given almost complete deference by the courts, particularly for economic regulation as opposed to regulations that affect fundamental rights (such as expressing opinions or religious worship). The test is far more exacting for "suspect" categories such as race and gender. While these types of classifications are rarely found in modern land development regulations, communities have lost equal protection challenges for the application of regulations that affect persons with intellectual disabilities. While not a challenge to the code as written, the U.S. Supreme Court in *City of*



➡ More complicated code concepts, like connectivity requirements, often benefit from illustrations.

In addition, it is a good idea for a code to include findings and purpose statements to guard against challenges to a code provision's rationality or purpose. This tells the public and applicant why the provision exists, points to policies or studies that back up the standards, and helps staff and administrative agencies interpret its provisions. Courts typically defer to legislative findings. This is helpful if the community needs to defend the regulations against a substantive due process, equal protection, First Amendment, or even a takings challenge (see discussion of these issues below).

Equal Protection

Due to the Equal Protection Clause of the Fourteenth Amendment, classifications or other dif-

Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), overturned the denial of a special use permit for group home housing intellectually disabled clients. While the Court refused to impose a more exacting standard to justify this classification, it found that there was no rational basis to treat group homes differently from other congregate care facilities. The city could have avoided this result with a carefully crafted use classification, neutral regulations, and an even-handed process for approving group homes.

Takings

The Fifth Amendment stipulates that property cannot be taken without compensating the property owner. Regulations that excessively

restrict the use or development of property (“economic takings”), or that require persons to surrender an element of their property rights (“exactions”), can result in financial liability for the local government. It is rare for a regulation to result in a taking. Courts have upheld standards that remove 90 percent or more of a property’s value. Mere hardship with compliance does not raise a takings claim, and property owners have an extremely high burden of proof on these issues. In addition, takings liability from exactions usually occurs on a case-by-case basis. The U.S. Supreme Court’s decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), indicates that takings liability for exactions arises only from case-by-case permit leveraging rather than legislation. However, code standards that require disproportionate exactions could create takings liability when they are applied. Therefore, it’s a good idea for local governments to vet code standards with affected stakeholders, to use generally accepted standards, or to support standards that raise the bar with studies or experience from other jurisdictions that use them. While these are not legally required, they can help a community defend those standards in court if needed.

First Amendment

The First Amendment to the U.S. Constitution prohibits laws that abridge the freedom of speech. Freedom of speech is an issue when communities regulate signs and sexually oriented businesses. Ideally, sign regulations should avoid regulating “content” (i.e., what the sign says) and not restrict signs so excessively that it chokes off an avenue of communication. An example of this is an Arlington County, Virginia, regulation that allowed only two signs on residential property. While the regulation was content-neutral, it restricted too much speech because the property owner might support more than two candidates during an electoral season, or the spouses who occupy the residence might support two different candidates apiece (*Arlington County Republican Committee v. Arlington County, Va.*, 983 F.2d 587 (4th Cir. 1993)).

Sexually oriented speech—including sexually explicit motion pictures or nude dancing—is considered expressive conduct protected by the First Amendment. While courts do allow regulations directed to sexually oriented businesses, they must be directed to the “secondary effects” of those businesses. Studies have associated sexually oriented businesses

with increased crime, reduced property values, blight, and lower neighborhood quality of life. Local governments should document these effects in the regulations or adoption ordinances. In addition, sexually oriented business regulations, which typically regulate their location by district and setbacks, must allow an adequate number of businesses to operate in a community. These are complicated issues where planners can provide indispensable assistance by documenting secondary impacts and the number of locations and areas where sexually oriented businesses can operate.

Religious land uses (such as churches) have become a thorny legal issue in recent years. In the past, religious uses were properly regulated so long as the code treated those institutions the same way they treated another assembly type use or public gathering. In addition to this “equal treatment” requirement, the Religious Land Use and Institutionalized Persons Act now prohibits regulations that “substantially burden” a religious exercise unless it furthers a compelling government interest and is the least restrictive way to accomplish that purpose. This means that land-use regulations that impose limits or costs on churches could

be challenged under federal law. A successful challenge could result in financial liability, such as paying the plaintiffs’ attorney fees.

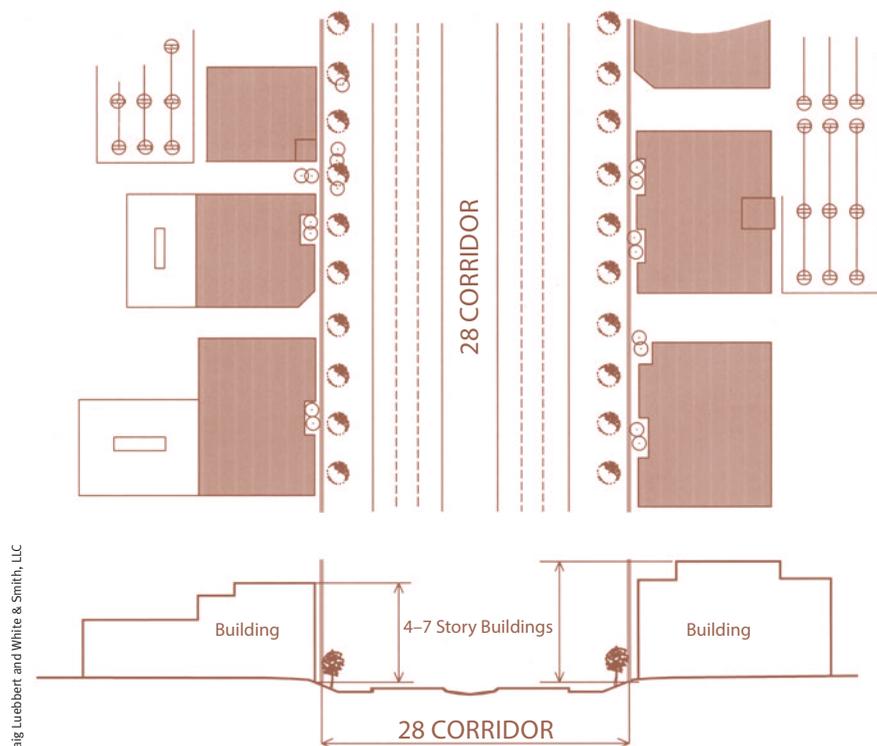
WRITING WELL

Because codes are legal documents, they are often written in “legalese.” This means long sentences, arcane language, and awkward sentence structures. Words like “hereinafter” and “notwithstanding,” with long phrases like “shall be required to,” make many codes difficult to read. Furthermore, this writing style often buries key information. Fortunately, there is no legal requirement to write codes in “legalese.” No court has ever invalidated a development code because it was too succinct and easy to read.

As is discussed above, due process requires only that code language is understandable to persons of reasonable intelligence. Writing clearly can only make a code easier to understand. Here are a few basic best practices for code drafting:

Provide information in digestible chunks.

Write short sentences. Avoid long sentences and paragraphs, and present information in bullet points and tables where possible.



Craig Lubbert and White & Smith, LLC

➔ Simple illustrations can clarify design prescriptions, such as build-to lines or building height minimums.

While codes are legal documents, communities should not view legal protections as limitations on good planning.

Use the active voice. This simple technique makes codes shorter, simpler, and easier to read than standard legal forms. For example, replace “the applicant shall be required” with “the applicant shall . . .”

Explain legal terms. Some terms—such as nonconformities, hardships, or similar zoning phrases—are either required by law or have well-established legal meaning. Explain what these terms mean so that applicants understand them. But don’t leave them out or replace them with unfamiliar words that require a judge to sort them out.

Incorporate graphics that illustrate your standards. This is helpful for people who don’t use codes on a day-to-day basis. And they show what a building that complies with your standards looks like and that it’s possible to comply with them. While graphics with no relationship to the written text are unhelpful, at least one court held that illustrations could have saved otherwise vague architectural standards from a vagueness challenge (*Anderson v. City of Issaquah*, 851 P.2d 744 (Wash. App. 1993)).

Provide a logical sequence. Place information that most people look for frequently near the front of the code. For example, because both applicants and the general public want to know the use and development potential of property in their neighborhood, I usually place the zoning districts near the front of the document. Exile technical information—such as submittal requirements, rules of interpretation, and severability clauses—to the end of the code or to appendices. A good table

of contents and index is also helpful. Online code-hosting services are invaluable tools for helping both experienced users and the general public retrieve and understand code information. They allow codes to be displayed, navigated, and searched on electronic devices such as computers, tablets, and even smartphones.

Avoid ambiguous phrases. For example, don’t require buildings to “avoid monotonous design.” Instead, provide building design standards—preferably with illustrations—that show what your community wants.

Avoid internal conflicts. Regulations that give applicants inconsistent direction may need appeals or court decisions to sort out what is required. They could also lead to vagueness challenges.

Say what you mean. If your regulations can be interpreted six different ways, it’s likely that a court will offer its own interpretation. That interpretation might not align with your community’s objectives. Courts usually pick the interpretation that is least restrictive on property owners and not the one that expands a community’s regulatory powers.

Don’t leave things out. If a code provision is legally required, or a development standard is needed, don’t exclude it. The community cannot enforce standards that are missing from the code. Instead, sequence the code, illustrate the standard, and use the code-drafting principles discussed above to make sure that people understand it.

CONCLUSION

Development codes are a community’s key tool for implementing a comprehensive plan. They are a powerful tool because they regulate private property but are also subject to significant legal requirements and limitations. Planners writing development codes should become familiar not only with federal statutes and constitutional law, but also their own state’s enabling legislation and how courts interpret it. Codes that fail to heed statutory mandates are unenforceable, and those that violate constitutional rights can result in financial liability and a burden on local budgets.

Fortunately, the practice of code drafting has evolved significantly over the years. Planners face increasing federal and state mandates and a proliferation of land use court precedent. However, software and the technical skills and resources to write well, illustrate standards, and find answers to thorny legal issues are better than ever. While codes are legal documents, communities should not view legal protections as limitations on good planning. Instead, these protections are one of the many factors a planner considers when formulating and implementing policy. As the community’s key plan implementation tool, a legally enforceable development code is a benefit to the general public, developers, and a community’s planning staff alike.

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IS YOUR COMMUNITY'S
DEVELOPMENT CODE ON
THE RIGHT SIDE OF THE LAW?

11