

Understanding

THE LAW OF ZONING AND LAND USE CONTROLS

THIRD EDITION



Barlow Burke



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UNDERSTANDING THE LAW OF ZONING AND LAND USE CONTROLS

Third Edition

Barlow Burke
Professor of Law
American University



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UNDERSTANDING THE LAW OF ZONING AND LAND USE CONTROLS

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PREFACE

Zoning, land use, and environmental regulation was one of my first professional interests. My students in any course I taught in the early 1970s, can attest to this. Trained as a city planner, I have long been familiar with the literature and discipline of land use planning. Yet, I came to know that the field is a crowded one. A brief survey of the legal periodicals will confirm that land use and takings law is a tough area in which to write and not be preempted by the annual out-pouring of writing, both from law professors and students. Aside from a law review article published to gain myself a promotion, I went elsewhere to find subjects for my writing, all the while teaching and thinking about this subject. I am happy now to return to it in print.

Not only is the field a crowded one, but it is also jurisdiction-specific. The practice of land use law does not travel well across state lines, and few practices are even state wide in scope. The opinions of state Supreme Courts reflect this. It takes time to learn what does travel and what is worth learning in law school about this subject. I'm glad I waited.

This book is the result of that wait. It is written for two types of readers. First, there is the first-year law student whose professor presents the law of zoning, land use controls, and regulations, in the context of the required course on real property. It is also rich enough in detail to appeal to a more advanced student in an upper-level elective course or seminar on the same subject, although this reader can be selective because she will have less difficulty understanding the constitutional and administrative framework for land use controls. For neither type of reader is this book intended as a treatise. I have always tried to include and discuss leading cases, but otherwise citations are kept to a representative-case minimum.

First, I set out the constitutional framework for land use regulation in a discussion of the takings clause, with a summary of the salient constitutional rules as the discussion proceeds and at the end of this part of the book. The United States Supreme Court opinions on the takings clause present a jurisprudence that will provoke useful and lively discussion in class about the make-up of the Court, and its short and long range purposes in deciding these cases. They provide fascinating material for Court watchers. The land use bar provides experts more sensitive to the nuances of these opinions than your constitutional law professor is likely to be. The discussions of these opinions here are intended to give you a background to participate in further analysis of these cases and a context in which to set the Supreme Court's future land use opinions.

Next appears a discussion of the basic form of land use controls — Euclidian zoning. Once the basic form of a zoning ordinance is summarized and presented, the text discusses more complex forms of land use regulation — so-called non-Euclidian regulations; these require an attorney to exercise increasing amounts of administrative and professional discretion and involve negotiation with municipal officials. Along the way, these chapters present and discuss basic problems, as well as problems based on the United States Supreme Court opinions that relate to these types of land use regulations.

Administrative and legislative relief from land use controls is the bread and butter of a land use practice. This discussion proceeds in that way, and from the straight-forward to the discretionary. Distinguishing a client's need for a variance, special exception, rezoning, or other administrative actions, is often the first task of an attorney presented

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with a land use problem. It is basic and imperative that an attorney understand the uses to which each can be put, separately and in combination, and not waste a client's time and money pursuing the wrong one.

Finally, halting further regulation of a client's property by pursuing vested rights and estoppel is the last task of the attorney discussed in the body of the book.

In writing this book, I owe three debts. First, I owe much to the students and research assistants who have read it over the years. They are Esten Goldsmith, Patricia Hammes, Sean Fleming, Julie Richmond, Stephanie Quaranta, and Erika Gaspar.

Second, as my friend and co-teacher for more than two decades, John J. Delaney, of the Maryland firm of Linowes & Blocher, has unstintingly provided me with a wealth of knowledge of, enthusiasm for, and professionalism of the highest caliber in land use practice as he has seen it evolve during the four decades of his own law practice. This book, *donum indignum*, is dedicated to John.

Third, and more recently, Phil J. Tierney has added to it with the insights of a state administrative law judge and hearing examiner with a special interest, enthusiasm, and expertise in land use.

To John, Phil, and now in Phil's place, Stephen Orens, all distinguished attorneys, I, my students, and this book owe much.

Barlow Burke
Washington, D.C.
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