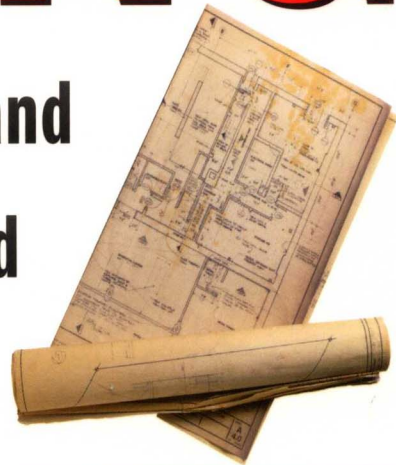


"THE DEFINITIVE GUIDE TO ZONING."—DUANE DESIDERIO, NATIONAL ASSOCIATION OF HOME BUILDERS

THE COMPLETE GUIDE TO ZONING

**How Real Estate Owners and
Developers Can Create and
Preserve Property Value**



**DWIGHT H.
MERRIAM,
FAICP, CRE**

- ✓ Win Necessary Approval for Your Building or Renovation Plans
- ✓ Fight an Undesirable Building Project
- ✓ Protect Your Property Rights
- ✓ Indispensable Tools for Home Owners, Investors, and Developers

The Complete Guide to Zoning

**How Real Estate Owners and
Developers Can Create and Preserve
Property Value**

Dwight H. Merriam

McGraw-Hill

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5 6 7 8 9 0 FGR/FGR 0 9 8

ISBN 0-07-144379-7

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For Susan, Alexander, and Lucy for their support and understanding, and for helping me find the time to write.

Acknowledgments

I acknowledge the contributions of my mentors—Ted Bacon, Ed Kaiser, Dave Brower, Phil Green, Dave Godschalk, the late Jack Parker, the late Jim Webb, Quintin Johnstone, Bob Freilich, Dan Mandelker, and the late Marlin Smith—and the many peers from whom I have learned so much. Without the support of the incomparable Land-Use Group at Robinson & Cole, we could not have achieved such great success in our practice, and without the generosity of my partners in giving me the freedom to write, lecture, and teach while I practice law, I would not have been able to write this book.

Although what you read here is entirely my responsibility, I owe special thanks to great proofreaders and copyeditors. My wife, Susan; my assistant, Sue Golemon; and fellow lawyers at Robinson & Cole, Eric Lukingbeal and Frank Coulom all helped. Charles Janson, a lawyer in our Stamford office and the best copy-editor I know, spent days reworking the text. Finally, Melissa Scuereb and Janice Race at McGraw-Hill worked their magic, along with Alice Manning. Thank you all.

Introduction

Why should you read this book? Why did I write it?

You will learn enough about zoning law from reading my book—cover to cover or in bits and pieces—to get the most out of your real estate. This is true whether you own a small retirement condominium or a \$100 million manufacturing facility. You will have the benefit of my more than 25 years' experience in getting big and small projects approved and built. This book gives you the basic knowledge that you need to get the job done, whether it's adding a carport to your home or rebuilding a shopping center.

Most people don't know this, but with a little strategizing and some luck, you can double or triple your property's value in one night. That's what people often hire me for—to get the local officials to change the zoning to allow more development—but you don't have to be a lawyer or a planner to do it. Zoning changes create value. It's about as easy as printing money, if you know how to do it, and it's legal.

Introduction

Even professional planners and lawyers will learn some useful things from this book. Most planners (I am a certified planner as well as a lawyer) have a great interest in land-use law, but often find themselves shortchanged by the arcane legal texts available. I'm reminded of the book report by the third grader that began: "This book taught me more about penguins than I wanted to know." Law texts tell us more than we need to know in order to solve most real-world problems.

At the same time, many lawyers who are sole practitioners or in small firms (they amaze me by their ability to do everything from divorces to slip-and-fall cases to estate planning) will find this book a useful reference when it's time to get down to basics. The practice pointers alone make it worth having on hand.

And, importantly, where a neighbor tries some mischief (like turning a hobby of breeding dogs into a commercial kennel), you will know how to defend your rights. Just as you can greatly increase your property's value, your neighbors can practically wipe you out by doing something bad with their property. No one wants to live next door to a _____ (you fill in the blank). What are you going to do when the kids next door jack up their cars and leave them on concrete blocks in various states of disrepair? What are you going to do when the accountant across the street starts meeting clients at his home office, leaving cars stacked up and down the street? What are going to do if you own an apartment building and the landlord behind you abandons her building? This book gives answers and strategies for dealing with such problems.

After publishing 175 professional articles, coediting one book, and coauthoring another, I realized that professional planners and lawyers had plenty of good advice and information available, but you, the homeowner, the real estate investor, the local planning commissioner and business entrepreneur, had been offered nothing.

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So I jumped at the chance to write about what I have learned, much of it the hard way, in zoning wars over almost three decades. My reward will be to show up at a hearing and see you or others using this book to win at zoning.

How to Use This Book

If you have a couple of evenings to spare, you may wish to read this book from cover to cover. I have written it as I teach my courses to planners, developers, public officials, and law students. We start with the vocabulary of land-use law, discuss strategies for success, and follow with tactics and techniques for getting through the process.

However, I also welcome you to use the table of contents at the front and the index in the back to jump right to a hot topic. If you have a hearing ahead of you tomorrow night, you can skip right to that subject and attack it first. Many of your specific problems can be handled this way in short order.

Excuse the Warnings, But . . .

I'm a lawyer, so you know what I must tell you. First, what I write here has nothing to do with my clients or those of my law firm, past, present, or future. Don't think that you can jump up at a hearing where I'm representing a client and say something like George C. Scott did when playing Patton in the movie by the same name as he stood on the edge of the desert contemplating his battle with Rommel: "Dwight, you magnificent bastard, I read your book!" Besides, this book is more about strategies and tactics than about the substance of land-use law. For the substance, read my other books and articles.

And, of course, I'm not your lawyer; I'm just an author writing about a subject for general background. In most land-use cases, a

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property owner will benefit from consulting with a lawyer. Talk to one. Hire a professional planner, engineer, or environmental consultant as well. They can advise you on whether you need their help or not. Many times, after I review a case, I tell people that they can probably handle it on their own, but they can call me if they run into trouble. Other times, I will see a serious problem that they had blithely glossed over or missed entirely. While many land-use problems can be fixed through a second or third application, in some cases, you have only one shot—for example, when the town is in the process of changing its regulations and you have a pending application. In those cases, get professional help—don't blow your last chance at saving your property rights because you want to save some money at the wrong time.

I am not giving legal advice in this book, and I am not your lawyer. You need to understand that the law varies from state to state and from municipality to municipality, and that land-use cases are characteristically fact-driven. The facts of your particular property often determine the outcome. In that regard, by the way, question lawyers or planners who say that they can handle your case without seeing the property. I don't take a case or allow my people to work on one without walking the property. The site speaks to us in ways that nothing else can.

Finally, the many cases I comment on, among the thousands in which I have been involved, will not be traceable to any geographic area or particular parties because I have “dithered” the facts, changing irrelevant portions or combining aspects of several matters to completely obscure the actual case. In no event has any part of these case examples included anything that is not a matter of public record. That is indeed one of the unique attributes of zoning cases—they are profoundly public in almost every respect.

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PART I

**WHAT IS ZONING
AND LAND-USE
LAW?**

The Importance of Zoning in Creating and Protecting the Value of Real Estate

Zoning is the public regulation of land use. Local governments—villages, towns, cities, and counties—adopt zoning to control the types of uses and the bulk, density, and dimensions of those uses. The federal and state governments do not zone land, at least not as we know typical zoning, but what they say and do, as we shall see, can completely change the local zoning landscape. Through zoning, the government tells you what you can and cannot do with your own land. This directly affects the value and utility of your property.

Zoning regulations broadly categorize uses as residential, commercial, and industrial. Within these big three, there are many more detailed subcategories. Residential uses include single-family detached homes; duplexes or two-family homes; zero-lot-line homes, which are single-family homes with no side yards or only one side yard; multifamily homes, including townhouses and walk-up flats; mobile home parks; and apartment buildings.

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There are as many possible categories as there are types of homes. The same goes for commercial uses, which range from small retail shops to warehouse stores that have floor plates of three acres or more. The variety of types and definitions is dizzying, even for the professionals. When writing regulations for local governments, it is best to concentrate on the definitions. Much of the law of zoning is simply in the definitions: how we choose and describe what is in and what is out.

To give you an idea of how definitions can rule the day, consider the movement to zone away fast-food chain restaurants. Some towns, in the belief that this is not a good use, have simply banned all formula restaurants, generally defined as restaurants with set architecture and a set menu that have more than a small number of outlets, say 10. You could have paid big money for a great site at a prime intersection for your national franchise fast-food restaurant and then have the zoning rug yanked out from underneath you with the adoption of a prohibition on formula restaurants. Watch out for those definitions!

In addition to the type of use, zoning regulates how intensively you can use your land. The regulation you probably are most familiar with is that of lot size. If you are in a one-acre residential zone, you need to have at least one acre to build one house. My guess is that you don't know how many square feet there are in an acre. Many of my land-use law students don't. It is 43,560 square feet. Now here's the curious part: No one else seems able to remember that odd number, so planners have come up with a little shortcut called the "zoning acre." That's right; many towns call an acre a nice, round 40,000 square feet so that no one has to remember the rest of it. I've had several cases where by designing the lots exactly to one "zoning" acre of 40,000 square feet, or one-half acre at 20,000 square feet, or whatever the lot size is, I have had enough land left over to make an additional lot. If you do the arithmetic, for every 12 lots at

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40,000 square feet, you will get 1 extra lot free—that's found money, just like someone gave you land.

Other dimensional regulations include front-yard setbacks and side-yard setbacks—how far back from the lot line your building must be. Watch out for overhangs. Believe it or not, in most towns a bay window jutting out from the side of a house may be an illegal encroachment into the side yard if the foundation is right on the setback line. In a recent case, a homeowner had to remove a second-floor addition that projected into the side yard, even though it was built totally in the air without touching the ground.

What is a “structure,” for purposes of determining what you can build where on your lot, can be found—you guessed it—in how a structure is defined. A gravel walkway is seldom a structure, but a walkway of poured concrete may be, and a slightly elevated wooden deck usually is. Sometimes you will find that the definitions point the way to how you can design your project to maximize the use of the land. A stone patio may be perfectly legal and serve your purposes just as well as a wooden deck in exactly the same spot would.

Dimensional limitations always include height and sometimes bulk. Height is expressed in feet above the ground or stories. For a house, the limitation is likely to be 35 feet or 3 1/2 stories. The fun begins when you try to figure out what is the ground and what is the top. If the ground is rolling or sloped, where do you take the measurement? It depends on (here we go again) the definitions.

Most regulations measure height from the ground to the top of the structure, of course, but where is the top? Sometimes it is the average height between the gable and a peak. More often than not, antennas, weathervanes, parapets (as compared with parapets), cupolas, and chimneys are exempt. A friend added a lighthouse-like cupola to the top of his beach house, and a fight ensued over a flagpole at the peak. Was it exempt or not? The solution by this architect owner was to have a flagpole that slid down into the

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cupola. I guess he hoisted the pole when the zoning enforcement officer wasn't in the neighborhood.

This silliness abounds. When my ski house in Vermont was finished, the builder commented that by his measurement it was 38 feet high. One might dispute that statement, as it is on a steeply sloping lot with a walk-out at the front of the basement level and with the rear of the house buried in the hillside. Technically, by some measure, it might be in violation of the 35-foot limitation. (Don't turn me in for some bounty—I'll claim that the statute of limitations has expired.)

If you had that situation, what would you do? One lesson you will see repeatedly in this book is that with zoning there are many ways to get at most problems. With the too-tall house, I would ask a client in this pickle, "Well, as an experienced zoning lawyer, I see you have two choices: lower the roof or raise the ground." "Whaaat," the client would yelp. "You fool, I can't cut off the top of my house." So the answer is simple: You add three feet of fill around the house. Sounds crazy, but it works. Actually, as we shall see, there are many other ways of fixing a problem of non-compliance.

Sometimes the absolute size of a building is controlled. One way of limiting size is a regulation called a "square on the lot." This requires a minimum square or rectangle on a lot to make sure there is enough developable land on even the most oddly shaped lots. That square might be 100 feet by 100 feet, so it does little to control the maximum size. Such a square yields 10,000 square feet, a very large house.

To stop so-called McMansions, those really big houses on really small lots in older quaint neighborhoods, many towns have adopted maximum floor area restrictions and other controls. Pity the person who buys an expensive lot with a run-down house on it and plans to scrape off that house and build a starter palace, only