

LAND USE PLANNING AND DEVELOPMENT REGULATION LAW

Second Edition

Julian Conrad Juergensmeyer
Thomas E. Roberts

Hornbook Series®

THOMSON
— ★ —™
WEST

LAND USE PLANNING AND DEVELOPMENT REGULATION LAW

Second Edition

By

Julian Conrad Juergensmeyer

*Professor and Ben F. Johnson Jr. Chair in Law
Georgia State University College of Law
Adjunct Professor in City and Regional Planning
Georgia Institute of Technology*

and

Thomas E. Roberts

*Professor of Law
Wake Forest University*

HORNBOOK SERIES®

THOMSON
—★—™
WEST

Thomson/West have created this publication to provide you with accurate and authoritative information concerning the subject matter covered. However, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. Thomson/West are not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

Hornbook Series, *Westlaw* and West Group are trademarks registered in the U.S. Patent and Trademark Office.

© West, a Thomson business, 1998, 2003

© 2007 Thomson/West

610 Opperman Drive

St. Paul, MN 55123

1-800-313-9378

Printed in the United States of America

ISBN: 978-0-314-17249-5



TEXT IS PRINTED ON 10% POST
CONSUMER RECYCLED PAPER



Dedication

*To the late Donald G. Hagman, whose enormous
contributions to land use law have guided our work.*

J.C.J. and T.E.R.

*To Ewa
Conrad, Erik and Krissy
Josh, Jonah, Jeremiah, and Julia*

J.C.J.

To Scott, Beth and Mark

T.E.R.

*

Preface

This hornbook owes its origins to Hagman, *Urban Planning and Land Development Control Law*, originally published in 1971. Its author, Professor Donald Hagman, was, and no doubt will continue to be, one of the most important figures in the land use planning and control field. After Don's tragic and untimely death in 1982, Professor Juergensmeyer began the preparation of a second edition, which was published in 1986. Those interested in Professor Hagman's many accomplishments may wish to read the dedications to him at 29 U.C.L.A.L.Rev. 772 (1982).

In 1998, when we began to prepare a third edition of the Hagman book, we realized that land use planning and control law had changed so much in the 27 years since the first edition—and in fact, so much in the 12 years since the second edition, that to represent the new book as a third edition with Don Hagman still listed as an author would be misleading. We therefore changed the title and published the book as Juergensmeyer & Roberts, *Land Use Planning and Control Law* (1998). In 2003 we brought out a new edition with a title change intended to reflect evolution of our subject matter, namely, Juergensmeyer & Roberts, *Land Use Planning and Development Regulation Law* (2003). This time around, 2007, we have retained the title and indicated the numerous changes by labeling it a Second Edition. This hornbook, with the same title and also indicated as a "Second Edition," is an abridged version of the Practitioner Treatise Series Second Edition and is intended to be more manageable for student use. Numerous footnotes and some text have been omitted; therefore, readers doing land use law research may wish to consult the Practitioner Series Second Edition.

We have benefited from the insights and comments of many colleagues. In particular, we would like to thank James Nicholas, James Wadley, Chris Nelson, Ray Young, David Callies, Bob Freilich, Clif Weaver, Fred Bosselman, Dwight Merriam, Bob Rhodes, Tom Pelham, James Bross, Tyson Smith, Clancy Mullen, Jim Duncan, Jerry Weitz, and Ed Ziegler.

Professor Juergensmeyer wishes to acknowledge the professional support of Deans Janice Griffith and Steve Kaminshine of Georgia State University College of Law, President Carl Patton of Georgia State University, and Professor Cheryl Contant of the Georgia Institute of Technology.

Professor Roberts acknowledges the support of Wake Forest University School of Law, in particular, its Dean, Robert Walsh, and the research assistance of Adam Roark.

*

v

Westlaw® Overview

Land Use Planning and Development Regulation Law offers a detailed and comprehensive treatment of the complex issues involving land use. To supplement the information contained in this book, you can access Westlaw, West's computer-assisted legal research service. Westlaw contains a broad array of legal resources, including case law, statutes, expert commentary, current developments, and various other types of information.

Learning how to use these materials effectively will enhance your legal research abilities. To help you coordinate the information in the book with your Westlaw research, this volume contains an appendix listing Westlaw databases, search techniques, and sample problems.

The instructions and features described in this Westlaw overview are based on accessing Westlaw at **www.westlaw.com**.

THE PUBLISHER

*

Summary of Contents

	Page
PREFACE	v
WESTLAW OVERVIEW	vii
Chapter	
1. An Introduction to Land Use Planning and Control Law	1
2. Comprehensive Plans and the Planning Process	13
3. Land Use Controls: History, Sources of Power, and Purposes	42
4. Zoning Basics	67
5. Zoning Process: Obtaining or Resisting Development Permis- sion	126
6. Exclusionary and Inclusionary Zoning.....	214
7. Subdivision and Planned Unit Development Control Law	252
8. Building and Development Codes	299
9. Growth Management and Smart Growth.....	316
10. Constitutional Limitations on Land Use Controls.....	403
11. Regulation and Protection of Environmentally Sensitive Lands	521
12. Aesthetic Regulation and Historic Preservation	555
13. Agricultural Land Protection and Preservation.....	578
14. Nuisances.....	620
15. Private Land Use Controls.....	627
16. The Power of Eminent Domain	636
APPENDIX--WESTLAW REFERENCES	647
TABLE OF CASES	667
INDEX	705

*

LAND USE PLANNING AND DEVELOPMENT REGULATION LAW

Second Edition

*

Table of Contents

	Page
PREFACE	v
WESTLAW OVERVIEW	vii
CHAPTER 1. AN INTRODUCTION TO LAND USE PLANNING AND CONTROL LAW	
Sec.	
1.1 The Development of Land Use Planning and Control Law ..	1
1.2 Scope of This Book	2
1.3 Issues for the Twenty-First Century	5
1.4 Characteristics of Land Use Planning and Control Law	9
1.5 Research Sources	10
A. Westlaw	10
B. One Volume Treatises	11
C. Multi-Volume Treatises	11
D. Law Reviews	11
E. Newsletters	12
F. On-Line: Internet Sources	12
CHAPTER 2. COMPREHENSIVE PLANS AND THE PLANNING PROCESS	
I. PLANNERS AND PLANNING	
2.1 The Practice of Planning	13
II. ANTECEDENTS OF LOCAL GOVERNMENT PLANNING	
2.2 The Colonial Planning Era	16
2.3 The Sanitary Reform Movement	18
2.4 The City Beautiful Movement	19
2.5 The Advent of Planning Commissions	21
2.6 Early Conceptions of the City Plan	22
III. RELATIONSHIP OF PLANNING AND ZONING	
2.7 The Promulgation of Zoning Ordinances	23
2.8 Zoning Displaces Planning	24
IV. THE PROCESS OF PLANNING COMPREHENSIVELY	
2.9 The Function of the Plan	26
2.10 The Rational Planning Process	27

	Page
Sec.	
V. THE LEGAL STATUS OF THE COMPREHENSIVE PLAN	
2.11 Plans as Optional Policy Documents	31
2.11A Incentive Based Comprehensive Planning.....	33
2.12 Plans as Mandatory Policy Documents	33
2.13 The Consistency Requirement	34
A. The Meaning of Consistency.....	34
B. Judicial Enforcement of the Consistency Requirement ..	39
C. Consistency and the Standard of Judicial Review	40
2.14 Smart Growth and New Urbanism	41
CHAPTER 3. LAND USE CONTROLS: HISTORY, SOURCES OF POWER, AND PURPOSES	
I. INTRODUCTION	
3.1 Introductory Note	43
II. THE HISTORY OF LAND USE CONTROLS	
3.2 Pre-Twentieth Century	43
3.3 Comprehensive Zoning.....	44
3.4 Early Constitutional History of Zoning.....	45
A. Pre-Comprehensive Zoning Cases	45
B. Constitutional Parameters of Comprehensive Zoning: Euclid and Nectow	46
C. The Current Generation of Cases	46
III. SOURCES OF POWER	
3.5 In General.....	46
3.6 Standard Zoning Enabling Act	47
3.7 Inherent and Implied Powers.....	49
3.8 Charter	50
3.9 Home Rule	51
3.10 Initiative and Referendum	51
3.11 Special Enabling Acts	51
3.12 Geographical Reach	52
A. Extraterritorial Zoning.....	52
B. Annexation and Prezoning.....	52
IV. PURPOSES	
3.13 In General.....	53
3.14 Preservation of Property Values	54
3.15 Preservation of Character.....	55
3.16 Traffic Safety.....	56
3.17 Public Health	56
3.18 Regulation of Competition	57
3.19 Fiscal Zoning to Increase Tax Base	58

Sec.		Page
3.20	Promotion of Morals	59
3.21	Managing Growth	59
	A. Short-term Controls: Interim Zoning	60
	B. Long-term Growth Management	60
3.22	Zoning to Lower Condemnation Costs	61

V. ALTERNATIVES

3.23	Alternatives to Euclidean Zoning and the Standard Act	61
3.24	The Model Land Development Code	62
3.25	Wipeout Mitigation and Windfall Recapture	64
3.26	Wipeouts Defined	64
3.27	Windfalls Defined	65
3.28	Implementing Land Value Capture and Compensation Programs	66
3.29	Zoning by Special Assessment Financed Eminent Domain (ZSAFED)	66

CHAPTER 4. ZONING BASICS

I. INTRODUCTION

4.1	Types of Zones: In General	69
-----	----------------------------------	----

II. USE ZONES

4.2	Use Zoning	70
	A. In General	70
	B. Permitted Uses	71
	C. Regulating Use, Not Ownership	72
4.3	Cumulative and Exclusive Use Zoning	73
	A. Higher and Lower Use Zones	73
	B. Intensive and Unintensive Use Zones	73
	C. Exclusive and Cumulative Use Zones	74
4.4	Accessory Uses and Home Occupations	75
	A. Historical Basis and Modern Status	75
	B. Incidental and Customary Use	75
	C. Accessory Residential Use	76
	D. Professional Offices	77
4.5	Single-Family Use	77
	A. The Single-Family Exclusive Zone	77
	B. Who Constitutes a Family?	78
4.6	Group Homes as Single-Family Use	80
4.7	Federal Disabilities Laws and Use Zoning	82
	A. Fair Housing Amendments Act	82
	B. Americans With Disabilities Act	82
4.8	Agricultural Uses	84
4.9	Industrial and Commercial Uses	86
4.10	Enterprise Zones and Tax Incentives	87
4.11	Buffer Zones	89

Sec.		Page
	III. HEIGHT, BULK, AND SETBACK CONTROLS	
4.12	Height Controls	89
4.13	Bulk and Setback Controls	90
	A. Minimum Lots and Frontages.....	90
	B. Setback and Lot Coverage.....	90
	C. Setback Lines for Street Widening Purposes.....	91
	D. Building Size.....	92
4.14	Floor-Area Ratio (FAR).....	94
	IV. ZONING WITH FLEXIBILITY	
4.15	The Need for Flexibility	95
4.16	Floating Zones	95
4.17	Conditional Zoning.....	97
	A. Inadequacy of General Rezoning Process.....	97
	B. Conditional Zoning as a Solution.....	98
	C. Automatic Zoning Conditions	99
4.18	Incentive Zoning	99
4.19	Performance Zoning	101
4.20	Interim Zones and Moratoria	102
4.21	Overlay Zoning	103
	V. GOVERNMENTAL AND COMMUNITY USES	
4.22	Favored Status	104
4.23	Immunity for Governmental Uses.....	105
	A. General Considerations	105
	B. Federal.....	106
	C. State and Local Government	106
	D. Local Government's Self-Exemption	107
4.24	Preemption of Local Law.....	107
4.25	Public Utilities.....	108
	A. General Rules	108
	B. What Constitutes a Public Utility.....	108
	C. Cellular Towers and Other Telecommunications Facilities	109
	D. Underground Utility Lines.....	111
4.26	Public-Private and Profit-Nonprofit Distinctions	111
	A. Public v. Private Uses	111
	B. Profit v. Nonprofit Uses.....	112
4.27	Schools	112
	A. Schools as Neighbors.....	112
	B. Public Schools	113
	C. Private Schools: Secular and Religious	114
	D. Qualifying as a School	114
4.28	Religious Uses	115

	Page
Sec.	
4.29 Airports	116
4.30 Hospitals and Medical Facilities	117
VI. NONCONFORMING USES	
4.31 In General.....	117
4.32 Lawful Existence.....	118
4.33 Restrictions on Nonconforming Uses.....	119
4.34 Change in Use	119
A. More Intensive Use	119
B. Similar or Less Intensive Use	120
C. Natural Growth: Right of Expansion	120
D. Natural Resources Diminishing Assets Doctrine	120
4.35 Repairs and Alterations.....	121
4.36 Conversion to Administrative Permission [Section Appears Only in Practitioner's Edition]	122
4.37 Termination of Nonconforming Uses: In General.....	122
4.38 Destruction and Abandonment.....	122
A. Destruction.....	122
B. Abandonment, Discontinuance and Merger	122
4.39 Amortization	122
4.40 Immediate Termination of Nuisance	124
CHAPTER 5. ZONING PROCESS: OBTAINING OR RESISTING DEVELOPMENT PERMISSION	
I. INTRODUCTION	
5.1 Zoning "Forms of Action"	128
5.2 Coping With the Cost of Land Use Disputes	129
A. Lawsuits to Deter or Retaliate Against Public Partic- ipation	130
B. Mediation	132
II. LEGISLATIVE AND ADMINISTRATIVE POWERS	
5.3 Delegation to Administrative Body	133
5.4 Delegation to Property Owners	135
5.5 Initiative and Referendum	137
III. REZONINGS	
5.6 Amendments Generally.....	142
5.7 Neighbor Protests: Extraordinary Majority Requirements...	143
5.8 Grounds for Rezoning	143
5.9 Rezoning: Legislative or Quasi-Judicial Action?	145
5.10 Spot Zoning.....	148
5.11 Contract and Conditional Zoning.....	150
A. Tests of Validity	150
B. Some Examples	152

Sec.		Page
	C. Conditions Imposed by Private Covenant	153
	D. Remedies	154
5.12	Piecemeal or Partial Zoning	155
5.13	Uniformity and Classification	156
IV. VARIANCES		
5.14	Variances: In General	157
5.15	Area or Dimensional Variances and Use Variances	158
5.16	Overall Standards and Unnecessary Hardship	160
5.17	Consideration of Personal v. Land-Based Factors	161
	A. Personal Hardship	161
	B. Disabled Persons	161
	C. Self-Created Hardships and Purchase with Knowledge	162
5.18	Effect on Public	164
5.19	No Reasonable Return	164
5.20	Unique or Unusual Characteristics of Property	166
5.21	Effect on Neighborhood	167
5.22	Conditions	168
5.23	Practical Difficulties	169
V. SPECIAL PERMITS		
5.24	Special Permits	170
	A. In General	170
	B. Distinguishing Features	171
	C. Growth in Use	171
5.25	Standards	172
5.26	Conditions	175
VI. VESTED RIGHTS AND DEVELOPMENT AGREEMENTS		
5.27	The Vesting Issue	176
5.28	Vesting Under Building Permits	178
	A. Substantial Reliance	178
	B. Good Faith	179
	C. Permit Requirement	180
	D. Right to Obtain Permit Based on Existing Zoning	181
	E. Municipal Good Faith	182
	F. Pending Ordinance Doctrine	182
	G. Moratoria to Protect Planning Process	182
	H. Illegally Issued Permit	183
	I. Municipal Liability for Wrongfully Issued Permits	184
	J. Zoning Change Invalid	185
5.29	Estoppel	185
5.30	Statutory Solutions to Uncertainty	187
5.31	Development Agreements	189
VII. JUDICIAL REVIEW		
5.32	Introduction	192

Sec.		Page
5.33	Types of Actions.....	193
	A. Certiorari.....	193
	B. Appeal.....	193
	C. Mandamus.....	194
	D. Injunction.....	194
	E. Declaratory Judgment.....	195
	F. Alternative Remedies.....	195
5.34	Standing.....	195
	A. In General.....	195
	B. Property Interest.....	196
	C. Neighbors.....	196
	D. Taxpayers.....	197
	E. Competitors.....	197
	F. Citizen Associations.....	198
	G. Local Governments.....	198
	H. Extraterritorial Litigants.....	198
5.35	Ripeness.....	199
5.36	Defenses.....	200
	A. Exhaustion of Remedies.....	200
	B. Limitations Periods.....	202
	C. Laches.....	203
	D. Indispensable Parties.....	203
	E. Estoppel.....	204
5.37	Standard of Review.....	204
	A. Legislative Acts.....	204
	B. Administrative Acts.....	205
5.38	Nature of Relief to Be Granted.....	206
	A. Legislative Proceedings.....	206
	B. Administrative Proceedings.....	207
	C. Consent Decrees.....	208
	D. Monetary Liability.....	208
5.39	Relief Under Federal Law.....	208
	A. Standing.....	209
	B. Removal.....	209
	C. Civil Rights Statutes.....	209
	D. Bankruptcy.....	210
	E. Eleventh Amendment.....	210
	F. Preemption.....	210
5.40	Enforcement.....	211
	A. Historical Inadequacies.....	211
	B. Public Enforcement Actions.....	211
	C. Private Enforcement Actions.....	212

CHAPTER 6. EXCLUSIONARY AND INCLUSIONARY ZONING

6.1	Introduction: The Evils of Exclusionary Zoning.....	214
-----	---	-----

	Page
Sec.	
6.2 Minimum Lot Size	217
6.3 Minimum Floor Space	219
6.4 Multi-Family Housing	220
6.5 Manufactured Housing	221
6.6 Fair Share Requirements	225
6.7 Inclusionary Zoning: Set Asides and Housing Trust Funds ..	228
A. Inclusionary Set-Asides	229
B. Housing Trust Fund Fees	232
6.8 The Fair Housing Act	233
A. Racial Discrimination	234
B. Discrimination Against the Disabled	235
C. Familial Status	239
6.9 Exclusion of Non-Residential Uses: LULUs	240
A. In General	240
B. Exclusion Infringing Fundamental Rights	243
C. State Preemption of Local Exclusion	243
D. Environmental Justice	243
E. Natural Resource Extraction	245
F. The Death Industry: Cemeteries and Funeral Parlors ...	247
6.10 Standing to Challenge Exclusionary Zoning	248
CHAPTER 7. SUBDIVISION AND PLANNED UNIT DEVELOPMENT CONTROL LAW	
I. INTRODUCTION	
7.1 Subdivision Control Law: In General	253
II. SUBDIVISION REGULATIONS	
7.2 Introduction and History	254
7.3 Relation to Planning	257
7.4 Relation to Zoning	259
7.5 Definition of Subdivision	260
7.6 The Subdivision Approval Process	261
7.7 Enforcement Methods, Sanctions and Required Improve- ment Guarantees	263
7.8 Antiquated Subdivisions	265
7.9 Conservation Subdivisions	267
7.10 Exactions on Subdivision Approval	269
III. MAPPING FOR FUTURE STREETS AND OTHER PUBLIC IMPROVEMENTS	
7.11 In General	276
7.12 Relation to Master Plan and Planning	278
7.13 Relation to Zoning	279
7.14 Relation to Subdivision Control	279
7.15 Constitutionality	280

Sec.		Page
7.16	Effect of Official Map on Marketability of Title.....	282
IV. PLANNED UNIT DEVELOPMENTS		
7.17	Definition and History	283
7.18	Relationship to Zoning	286
7.19	Legal Status of PUDs.....	288
7.20	Scope of Judicial Review.....	292
7.21	Planned Unit Development Approval Process.....	293
7.22	Private Restrictions	296
CHAPTER 8. BUILDING AND DEVELOPMENT CODES		
8.1	In General.....	299
8.2	Model Codes	301
	A. Traditional Models.....	301
	B. Smart Growth and New Urbanism Codes	303
8.3	Relation to Zoning.....	306
8.4	Unauthorized and Unconstitutional Applications of Codes ..	307
8.5	State and Federal Preemption.....	309
8.6	Building Code Enforcement	311
8.7	Building Permits and Certificates of Occupancy.....	314
CHAPTER 9. GROWTH MANAGEMENT AND SMART GROWTH		
9.1	The Growth Management and Smart Growth Concepts	317
	A. Evolution of Growth Management and Smart Growth... 317	
	B. Smart Growth and Urban Sprawl.....	320
	C. New Urbanism	324
9.2	Growth Management and Smart Growth Programs.....	324
9.3	Power of Local Government to Establish Growth Manage- ment and Smart Growth Programs	328
9.4	Constitutional Limitations on the Power of Local Govern- ments to Establish Growth Management Programs.....	330
9.5	Growth Management Through Regional Planning and Reg- ulation	333
9.6	Moratoria and Interim Controls	336
9.7	Capital Improvement Programming	338
9.8	Infrastructure Finance.....	341
9.9	Developer Funding of Infrastructure.....	345
	A. Required Dedications	345
	B. Impact Fees	346
	C. Linkage and Mitigation Fees	374
9.10	Transferable Development Rights Programs	379
	A. General Theory: Mitigating Potential Wipeouts.....	379
	B. How TDRs Work	380
	C. Legal Issues	383
9.11	Green Space Protection	384