

---

# PLANNING AND CONTROL OF LAND DEVELOPMENT

---

Cases and Materials

---

FOURTH EDITION

---

Daniel R. Mandelker  
Roger A. Cunningham  
John M. Payne

---

CONTEMPORARY   
LEGAL EDUCATION SERIES

# **Planning and Control of Land Development**

**CASES AND MATERIALS**

**FOURTH EDITION**

**Daniel R. Mandelker**

Howard A. Stamper Professor of Law  
Washington University

**Roger A. Cunningham**

Late James V. Campbell Professor of Law  
University of Michigan

**John M. Payne**

Professor of Law & Justice Hall Scholar  
Rutgers University — Newark

  
MICHIE  
*Law Publishers*  
CHARLOTTESVILLE, VIRGINIA

COPYRIGHT © 1995  
BY  
MICHIE  
A Division of Reed Elsevier Inc.

---

COPYRIGHT © 1985, 1990  
BY  
THE MICHIE COMPANY  
A Division of Reed Elsevier Inc.  
and Reed Elsevier Properties Inc.

---

COPYRIGHT © 1979  
BY  
THE BOBBS-MERRILL COMPANY, INC.

---

Library of Congress Catalog Card No. 95-80658  
ISBN 1-55834-279-6

---

Printed in the United States of America  
All rights reserved.

# **PLANNING AND CONTROL OF LAND DEVELOPMENT**

**CONTEMPORARY  
LEGAL EDUCATION SERIES**



## LAW SCHOOL ADVISORY BOARD

### CO-CHAIRS

Howard P. Fink  
*Isadore and Ida Topper Professor  
of Law  
Ohio State University  
College of Law*

Stephen A. Saltzburg  
*Howrey Professor of Trial Advocacy,  
Litigation and Professional  
Responsibility  
George Washington University  
National Law Center*

### MEMBERS

Charles B. Craver  
*Leroy S. Merrifield Research Professor  
of Law  
George Washington University  
National Law Center*

Jane C. Ginsburg  
*Morton L. Janklow Professor of  
Literary and Artistic  
Property Law  
Columbia University School of Law*

Edward J. Imwinkelried  
*Professor of Law  
University of California at Davis  
School of Law*

Daniel R. Mandelker  
*Howard A. Stamper Professor of Law  
Washington University  
School of Law*

Mark V. Tushnet  
*Professor of Law  
Georgetown University  
National Law Center*

To Nikki, Alison, and Susan,  
and all who are like them

and

In memory of C.S.P.

## Preface

If this fourth edition retains the acceptance of its predecessors, an honor that the Editors have endeavored to earn, it will largely speak for itself, and we have therefore foregone the customary statement of purposes by way of preface. Instructors are invited to turn to the accompanying Teacher's Manual for a more detailed description of the changes we have made and our proposals for how this book might be used.

We instead use this Preface to note with great sorrow the passing of our colleague and co-Editor, Roger A. Cunningham, James V. Campbell Professor of Law at the University of Michigan Law School. Professor Mandelker enjoyed a long friendship with Roger, forged in part through many vigorous debates over how to realize the ideas now embodied in the volume which you hold. Professor Payne, who joins the enterprise with this edition, had the good fortune to work closely with Roger on the annual supplements to the third edition, and came rapidly to appreciate the keenness of his mind on subjects as diverse as covenants, takings, and exclusionary zoning. Despite the changes that time and circumstance make inevitable, this book will reflect the wisdom and learning of Roger Cunningham for many years to come.

August 16, 1995

*Daniel R. Mandelker*  
*John M. Payne*

## Acknowledgments

The American Society of Planning Officials for permission to reprint from *Commentary on James v. Valtierra*, by Fred P. Bosselman (1971). Reprinted with permission from Vol. 23, *Zoning Digest*, American Society of Planning Officials, 1313 E. 60th Street, Chicago, Illinois 60637.

Mr. David Brower for permission to reprint from D. Godschalk et al., *Constitutional Issues of Growth Management* 8-10, 149-153 (1979).

Center for Urban Policy Research for permission to reprint from Mandelker, *Energy Conservation Implementation Through Comprehensive Land Use Controls*. Reprinted with permission from *Energy and Land Use* (R. Burchell & D. Listokin eds. 1982).

The Duke University School of Law for permission to reprint from Richards, *Zoning for Direct Social Control*. Copyright 1982 by the Duke Law Journal.

Harvard Law Review for permission to reprint from Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, 80 Harv. L. Rev. 1165, 1172-77, 1181-83 (1967). Copyright 1967 by the Harvard Law Review Association.

International City Management Association and John Kriken for permission to reprint *San Antonio Corridor Design Plan* from *The Practice of Local Government Planning*, ed. Frank S. So et al. (1979); and to reprint from R. Drucker, *Land Subdivision Regulation*, in *The Practice of Local Government Planning*, ed. Frank S. So & Judith Getzels (1988).

Journal of Planning and Literature for permission to reprint from E. Howe, *Professional Roles and the Public Interest in Planning* in 6 *Journal of Planning Literature* 230, 231-32 (1992) and from Bollens, *Restructuring Land Use Governance* in 7 *Journal of Planning Literature* 211, 213, 215 (1993).

*Land Use Law and Zoning Digest* for permission to reprint from Coughlin & Keene, *The Protection of Farmland: An Analysis of Various State and Local Approaches* in 33 *Land Use Law and Zoning Digest* No. 6 (1981).

Methuen & Co., Ltd. for permission to reprint from I. Bracken, *Urban Planning Methods: Research and Policy Analysis* (1981).

Resources for the Future, Inc. for permission to reprint from Robert G. Healy and John S. Rosenberg, *Land Use and the States*, 2d ed. (Washington, D.C., Resources for the Future, 1979). Copyright 1979 by Resources for the Future.

Urban Land Institute, for permission to reprint from Douglas R. Porter, Patrick L. Phillips & Terry J. Lassar, *Flexible Zoning: How It Works*. Washington, D.C., 1988. ULI Catalog No.: F14.

Washington University Law Quarterly for permission to reprint from Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 Wash. U.L.Q. 60, 61, 63. Copyright 1963.

The West Publishing Company, for permission to reprint from O. Browder, R. Cunningham et al., *Basic Property Law* 1287-92, 1293-98.

Unless otherwise indicated in the text, the emphasis in all quoted materials is as in the original.

## Notes on a Bibliography

*Treatises.* In addition to Professor Mandelker's one-volume treatise on Land Use Law, which was recently revised, the late Professor Donald Hagman's one-volume treatise, Urban Planning and Land Development Control, is now published in a new edition and Professor Kmiec has published a Zoning and Planning Deskbook which is updated frequently. There are a number of multi-volume treatises. One of the most notable is Professor Norman Williams' American Land Planning Law, first published in 1974 and now substantially updated. Other multi-volume treatises of note are P. Rohan, Zoning and Land Use Controls; R. Anderson, American Law of Zoning; E. Yokley, Zoning Law and Practice; and Rathkopf's Law of Zoning and Planning, now thoroughly updated by Professor Ed Ziegler of Denver University. E. Yokley, Law of Subdivisions, is a good review of subdivision law. Federal law is covered by D. Mandelker, J. Gerard & T. Sullivan, Federal Land Use Law.

*Periodicals.* The Urban Lawyer, which is the official publication of the Urban, State and Local Government Law Section of the American Bar Association; the Washington University Journal of Urban and Contemporary Law; and the Florida State University Journal of Land Use and Environmental Law, regularly contain articles on land use topics. The Southwestern Legal Foundation publishes an annual Institute on Planning, Zoning and Eminent Domain that carries articles based on speeches presented at the Institute.

Two monthly periodicals are devoted entirely to land use law. The American Planning Association publishes the Land Use Law & Zoning Digest. Each issue contains a lead article and digests of recent cases and statutes. The Association also publishes a monthly Zoning News that reports on new developments in zoning around the country. Clark Boardman publishes a monthly Zoning and Planning Law Report that contains a lead article, case digests and reports on new developments. Clark Boardman also publishes an annual Land Use and Environment Law Review that reproduces leading articles published during the previous year and an annual Zoning and Planning Law Handbook that contains articles on land use topics. The Journal of the American Planning Association carries articles on land use planning and controls. Urban Land, published by the Urban Land Institute, has a section on regulatory problems that often covers land use issues.

Several journals are devoted to environmental law. Of these, the Ecology Law Quarterly, Environmental Law, the Harvard Environmental Law Review, and the Natural Resources Journal often carry articles on land use law. Coastal Management is a journal that carries articles on coastal zone programs.

*Publications and Services.* The American Planning Association publishes a periodic Planning Advisory Service. Each issue is a report on a land use or planning topic. The reports often discuss land use control problems and

techniques. Both the Association and the Urban Land Institute have an active publications program that includes books and other publications on land use topics.

*Bibliographies.* The Journal of Planning Literature, edited at Ohio State University's planning school and published by Sage Publications, is a quarterly publication that contains a bibliography of articles on land use and related topics as well as abstracts of the more important articles. The Journal of the American Planning Association contains bibliographies of books and periodical literature on land use and planning topics.

## Summary Table of Contents

	<i>Page</i>
<i>Preface</i> . . . . .	vii
<i>Acknowledgments</i> . . . . .	ix
<i>Notes on a Bibliography</i> . . . . .	xi
<i>Table of Contents</i> . . . . .	xv
CHAPTER 1: GOVERNMENT INTERVENTION IN LAND USE MARKETS . . . . .	1
A. Efficiency and Equity: Government Intervention and Its Alternatives . . . . .	4
B. Government Intervention through Planning . . . . .	19
CHAPTER 2: THE LEGAL BASIS FOR LAND USE CONTROLS: THE TAKING ISSUE AND FEDERAL REMEDIES . . . . .	45
A. Nuisance Law . . . . .	45
B. The Taking Issue . . . . .	66
C. Federal Remedies for Constitutional Violations . . . . .	158
CHAPTER 3: CONTROL OF LAND USE BY ZONING . . . . .	193
A. The History and Structure of the Zoning System . . . . .	193
B. How a Zoning Case Gets to State Court . . . . .	212
C. The Basic Zoning Techniques: Use, Bulk, and Density Controls . . . . .	233
CHAPTER 4: "EXCLUSIONARY" AND "INCLUSIONARY" ZONING IN THE SUBURBS . . . . .	371
A. Introduction . . . . .	371
B. Exclusion of Low-Income and Moderate-Income Households: State Court Cases and Statutes . . . . .	376
C. Exclusionary Zoning Litigation in the Federal Courts . . . . .	415
D. Discrimination Against Group Homes for the Handicapped . . . . .	442
CHAPTER 5: THE ZONING PROCESS: EUCLIDEAN ZONING GIVES WAY TO FLEXIBLE ZONING . . . . .	447
A. The Role of Zoning Change . . . . .	447
B. The Zoning Variance . . . . .	455
C. The Special Exception, Special Use Permit, or Conditional Use . . . . .	468
D. The Zoning Amendment . . . . .	476
E. Newer Forms of Flexible Zoning . . . . .	515
F. Site Plan Review . . . . .	533
G. The Role of the Comprehensive Plan in the Zoning Process . . . . .	535
H. Initiative and Referendum . . . . .	547
CHAPTER 6: CONTROLLING RESIDENTIAL DEVELOPMENT . . . . .	567
A. Subdivision Controls . . . . .	568
B. Dedications, Exactions, and Impact Fees . . . . .	589
C. Mapping and Reservation of Land for Public Facilities . . . . .	628
D. Planned Unit Development (PUD) . . . . .	631

	<i>Page</i>
<b>CHAPTER 7: GROWTH MANAGEMENT . . . . .</b>	<b>653</b>
<b>A. An Introduction to Growth Management . . . . .</b>	<b>653</b>
<b>B. Moratoria and Interim Controls . . . . .</b>	<b>660</b>
<b>C. Growth Management Control Strategies . . . . .</b>	<b>671</b>
<b>D. Controlling Growth through Public Services . . . . .</b>	<b>696</b>
<b>CHAPTER 8: AESTHETICS, DESIGN CONTROL, AND HISTORIC PRESERVATION . .</b>	<b>705</b>
<b>A. Aesthetics as a Regulatory Purpose . . . . .</b>	<b>705</b>
<b>B. Outdoor Advertising Controls . . . . .</b>	<b>708</b>
<b>C. Design Controls . . . . .</b>	<b>736</b>
<b>D. Historic Preservation . . . . .</b>	<b>748</b>
<b>CHAPTER 9: ENVIRONMENTAL LAND USE CONTROLS . . . . .</b>	<b>775</b>
<b>A. Protecting Natural Resource Areas . . . . .</b>	<b>778</b>
<b>B. Coastal Zone Management . . . . .</b>	<b>830</b>
<b>CHAPTER 10: REGIONAL AND STATE PLANNING AND DEVELOPMENT CONTROL</b>	<b>851</b>
<b>A. Regional Planning and Development Control . . . . .</b>	<b>852</b>
<b>B. State Planning and Land Use Regulation Programs . . . . .</b>	<b>860</b>
<hr/>	
<i>Table of Cases . . . . .</i>	<i>885</i>
<i>Index . . . . .</i>	<i>903</i>

## Table of Contents

	<i>Page</i>
<i>Preface</i> . . . . .	vii
<i>Acknowledgments</i> . . . . .	ix
<i>Notes on a Bibliography</i> . . . . .	xi
<i>Summary Table of Contents</i> . . . . .	xiii
—	
CHAPTER 1: GOVERNMENT INTERVENTION IN LAND USE MARKETS . . . . .	1
<i>A Note on Various Approaches to the Resolution of Land Use Disputes</i> . . . . .	1
A. Efficiency and Equity: Government Intervention and Its Alternatives . . . . .	4
1. Circumnavigating the Bramble Bush of Land Use Economics . . . . .	5
Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law . . . . .	9
2. Non-Zoning Approaches to Land Use Conflict Problems . . . . .	17
B. Government Intervention through Planning . . . . .	19
1. The Comprehensive Plan . . . . .	20
2. Planning Theory and the Planning Process . . . . .	25
a. The Planning Concept . . . . .	25
b. Planning Styles: "Rational Planning" and Its Alternatives . . . . .	29
E. Howe, Professional Roles and the Public Interest in Planning . . . . .	29
I. Bracken, Urban Planning Methods: Research and Policy Analysis . . . . .	37
CHAPTER 2: THE LEGAL BASIS FOR LAND USE CONTROLS: THE TAKING ISSUE AND FEDERAL REMEDIES . . . . .	45
A. Nuisance Law . . . . .	45
Bove v. Donner-Hanna Coke Corp. . . . .	45
Spur Industries, Inc. v. Del E. Webb Development Co. . . . .	56
B. The Taking Issue . . . . .	66
1. The Early Supreme Court Cases . . . . .	66
Hadacheck v. Sebastian . . . . .	67
Pennsylvania Coal Co. v. Mahon . . . . .	73
Village of Euclid v. Ambler Realty Co. . . . .	79
2. <i>Penn Central</i> : The Balancing Test . . . . .	94
Penn Central Transportation Co. v. City of New York . . . . .	94
<i>A Note on Physical Occupation as a Per Se Taking</i> . . . . .	107
3. <i>Keystone</i> and <i>Nollan</i> : Revising Taking Law . . . . .	109
Keystone Bituminous Coal Ass'n v. De Benedictis . . . . .	109
Nollan v. California Coastal Commission . . . . .	121
4. The <i>Lucas</i> Case: A New Per Se Taking Rule . . . . .	133
Lucas v. South Carolina Coastal Council . . . . .	133
<i>A Note on the Federal Circuit's Interpretation of Lucas in Wetlands             Cases</i> . . . . .	153

	<i>Page</i>
5. The Federal Takings Executive Order and Federal and State Takings Legislation . . . . .	156
C. Federal Remedies for Constitutional Violations . . . . .	158
1. Barriers to Judicial Relief: Ripeness . . . . .	158
2. Barriers to Judicial Relief: Abstention . . . . .	161
3. Inverse Condemnation . . . . .	164
First English Evangelical Lutheran Church of Glendale v. County of Los Angeles . . . . .	164
4. Relief under Section 1983 of the Federal Civil Rights Act . . . . .	178
a. The General Scope of Section 1983 . . . . .	179
Cloutier v. Town of Epping . . . . .	180
b. Immunity from Section 1983 Liability . . . . .	187
c. Remedies in Section 1983 Actions . . . . .	189
CHAPTER 3: CONTROL OF LAND USE BY ZONING . . . . .	193
A. The History and Structure of the Zoning System . . . . .	193
1. Some History . . . . .	193
2. Zoning Enabling Legislation . . . . .	197
A Standard State Zoning Enabling Act . . . . .	197
<i>A Note on Contemporary Zoning Enabling Legislation</i> . . . . .	202
3. The Zoning Ordinance . . . . .	204
A Typical Zoning Ordinance . . . . .	204
B. How a Zoning Case Gets to State Court . . . . .	212
1. Standing . . . . .	213
222 East Chestnut Street Corp. v. Board of Appeals . . . . .	213
2. Exhaustion of Remedies . . . . .	218
Ben Lomond, Inc. v. Municipality of Anchorage . . . . .	218
3. Securing Judicial Review . . . . .	225
Cople v. City of Lincoln . . . . .	225
4. Forms of Remedy . . . . .	227
A Preliminary Note on Remedies in Land Use Cases . . . . .	227
City of Richmond v. Randall . . . . .	229
C. The Basic Zoning Techniques: Use, Bulk, and Density Controls . . . . .	233
1. Districting and Nonconforming Uses . . . . .	233
City of Los Angeles v. Gage . . . . .	239
2. Residential Use Classifications . . . . .	247
a. Separation of Residential from Non-Residential Use . . . . .	247
b. Separation of Single-Family and Multifamily Uses . . . . .	249
Krause v. City of Royal Oak . . . . .	252
c. Single-Family Residential Use: The Non-Traditional "Family" . . . . .	260
Village of Belle Terre v. Boraas . . . . .	260
State v. Baker . . . . .	266
<i>A Note on Subsequent Treatment of the "Family" Definition</i> <i>Problem in the Supreme Court: Moore v. City of</i> <i>East Cleveland</i> . . . . .	276

	<i>Page</i>
City of Cleburne v. Cleburne Living Center . . . . .	279
<i>A Note on the Future of Single-Family Residential Zoning</i> . . . . .	292
d. Single-Family Residential Use and the Mobile Home Problem . . . . .	294
Robinson Township v. Knoll . . . . .	294
<i>A Note on Zoning and the Elderly</i> . . . . .	306
3. Commercial and Industrial Uses . . . . .	308
a. Control of Competition as a Zoning Purpose . . . . .	314
Ensign Bickford Realty Corp. v. City Council . . . . .	314
b. Antitrust Problems . . . . .	322
4. Uses Entitled to Special Protection . . . . .	325
a. Free Speech-Protected Uses: Adult Businesses . . . . .	325
City of Renton v. Playtime Theatres, Inc. . . . .	327
b. Religious Uses . . . . .	337
First Assembly of God of Naples v. Collier County . . . . .	340
5. Bulk and Density Controls . . . . .	345
a. In the City Core . . . . .	349
Team Four, Inc. [City of St. Louis, Missouri], Downtown Imple-	
mentation Strategy: The Interim Comprehensive Plan . . . . .	352
b. In the Suburban Fringe . . . . .	356
Simon v. Needham . . . . .	356
6. Innovations in Zoning for Use, Bulk and Density . . . . .	364
a. Building Block Zoning . . . . .	364
Sedway & Lloyd, Building Block Zoning Provides Flexibility . . . . .	364
b. Zero Lot Line Zoning . . . . .	366
c. Performance Zoning . . . . .	367
D. Porter, P. Phillips & T. Lassar, Flexible Zoning: How It	
Works . . . . .	367
CHAPTER 4: "EXCLUSIONARY" AND "INCLUSIONARY" ZONING IN THE SUBURBS	371
A. Introduction . . . . .	371
1. Definition of "Exclusionary" Zoning . . . . .	371
2. "Opening Up the Suburbs" as a Social Goal . . . . .	372
B. Exclusion of Low-Income and Moderate-Income Households: State Court	
Cases and Statutes . . . . .	376
1. In General . . . . .	376
2. Standing . . . . .	376
3. New Jersey: <i>Mt. Laurel</i> and Its Aftermath . . . . .	378
Southern Burlington County NAACP v. Township of Mt. Laurel (II) . . . . .	379
The New Jersey Fair Housing Act — O. Browder, R. Cunningham,	
G. Nelson, W. Stoeback & D. Whitman, Basic Property Law . . . . .	394
4. Exclusionary Zoning Litigation in Other States . . . . .	400
Wayne Britton v. Town of Chester . . . . .	400
O. Browder, R. Cunningham, G. Nelson, W. Stoeback & D. Whitman,	
Basic Property Law . . . . .	404
5. State "Affordable Housing" Legislation . . . . .	407

	<i>Page</i>
a. California . . . . .	408
b. Oregon . . . . .	409
c. Connecticut . . . . .	410
d. New Hampshire . . . . .	410
6. "Inclusionary Zoning" Programs . . . . .	411
C. Exclusionary Zoning Litigation in the Federal Courts . . . . .	415
1. Federal "Standing" Rules . . . . .	415
2. The Federal Court Focus on Racial Discrimination . . . . .	416
Village of Arlington Heights v. Metropolitan Housing Development Corp. . . . .	417
Huntington Branch, NAACP v. Town of Huntington . . . . .	428
3. The Federal Policy-Making Role . . . . .	441
D. Discrimination Against Group Homes for the Handicapped . . . . .	442
CHAPTER 5: THE ZONING PROCESS: EUCLIDEAN ZONING GIVES WAY TO FLEXIBLE ZONING . . . . .	447
A. The Role of Zoning Change . . . . .	447
Mandelker, Delegation of Power and Function in Zoning Administration . . . . .	447
Proceedings before the Planning and Zoning Board of the City of San Cibola . . . . .	449
B. The Zoning Variance . . . . .	455
Puritan-Greenfield Improvement Ass'n v. Leo . . . . .	455
<i>A Note on Area, Bulk, and Density Variances</i> . . . . .	466
C. The Special Exception, Special Use Permit, or Conditional Use . . . . .	468
Board of Supervisors of Fairfax County v. Southland Corp. . . . .	468
D. The Zoning Amendment . . . . .	476
1. Estoppel and Vested Rights . . . . .	477
Western Land Equities, Inc. v. City of Logan . . . . .	477
<i>A Note on Development Agreements</i> . . . . .	488
2. "Spot" Zoning . . . . .	489
Kuehne v. Town of East Hartford . . . . .	489
3. Quasi-Judicial Versus Legislative Rezoning . . . . .	495
Board of County Commissioners of Brevard County v. Snyder . . . . .	495
<i>A Note on Procedural Due Process Problems in "Quasi-Judicial" Actions</i> . . . . .	504
<i>A Note on Bribery and Corruption in Zoning</i> . . . . .	508
4. Downzoning . . . . .	509
Stone v. City of Wilton . . . . .	509
E. Newer Forms of Flexible Zoning . . . . .	515
1. With Pre-Set Standards: The Floating Zone . . . . .	515
Rodgers v. Village of Tarrytown . . . . .	515
<i>A Note on Overlay Zones and Special Zoning Districts</i> . . . . .	520
2. Without Pre-Set Standards: Contract and Conditional Zoning . . . . .	523
Collard v. Incorporated Village of Flower Hill . . . . .	523
F. Site Plan Review . . . . .	533