

UNDERSTANDING THE LAW OF ZONING AND LAND USE CONTROLS

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MATTHEW  BENDER

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

PREFACE

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.
April 2013

TABLE OF CONTENTS

Part 1	FUNDAMENTAL CONCEPTS: THE POLICE POWER, TAKINGS, AND ZONING	1
Chapter 1	THE POLICE POWER	3
§ 1.01	DILLON’S RULE	6
Chapter 2	THE TAKINGS CLAUSE AND ITS PUBLIC USE REQUIREMENT	13
§ 2.01	THE TAKINGS CLAUSE	13
§ 2.02	THE PUBLIC USE REQUIREMENT	16
[A]	The <i>Berman</i> Case	18
[B]	The <i>Midkiff</i> Case	19
[1]	Later Developments	21
[C]	The <i>Poletown</i> Case	22
[1]	Industrial Parks and Mining	24
[D]	The <i>Oakland Raiders</i> Case	24
[E]	<i>Kelo v. City of New London</i>	25
[1]	The Decision	25
[2]	Reaction to <i>Kelo</i>	29
Chapter 3	TYPES OF TAKINGS — PHYSICAL AND REGULATORY TAKINGS	31
§ 3.01	PHYSICAL TAKINGS	31
[A]	Criticism and Response	33
[B]	Citations to Other Cases in <i>Loretto</i>	34
[C]	Personal Property and the <i>Loretto</i> Rule	34
[D]	The Aftermath of the Case	35
[E]	Easements	36
§ 3.02	<i>YEE</i> LIMITS ON <i>LORETTO</i> ’S CATEGORICAL RULES	36
[A]	<i>Loretto</i> and <i>Yee</i> Combined	38
§ 3.03	REGULATORY TAKINGS	38
[A]	Early Nuisance Abatement Cases	39
§ 3.04	<i>PENNSYLVANIA COAL CO. v. MAHON</i>	40
[A]	The Facts	40
[B]	Diminution in Value	41
[C]	Balancing Public Benefits against Private Injuries	41
[1]	The Property	43
[2]	Reciprocity of Advantage	44

TABLE OF CONTENTS

[3] A Regulation that “Goes Too Far” 45

[D] Takings Jurisprudence 45

[E] The Natural State Exception 46

[F] The Police Power, Nuisances, and *Mahon* 47

[G] Holmes and the *Euclid* Case 47

§ 3.05 *KEYSTONE BITUMINOUS COAL ASSOCIATION v. DEBENEDICTIS* . . 48

[A] Distinguishing *Mahon* 48

[B] Narrowing *Mahon* 49

§ 3.06 CONCLUSION 50

Chapter 4 THE EVOLUTION OF REGULATORY TAKINGS 53

§ 4.01 THE FACTS IN *PENN CENTRAL* 53

[A] The *Penn Central* Test 54

[1] Investment-Backed Expectations 55

[2] Two Applications of IBEs 56

[3] IBEs and *Palazzolo v. Rhode Island* 57

§ 4.02 JUSTICE BRENNAN’S *PENN CENTRAL* MAJORITY OPINION 58

[A] The Restatement Section 58

[B] The Refutation Section 58

[C] The “As Applied” Section 59

[D] TDRs 60

§ 4.03 THE HOLDINGS 61

§ 4.04 THE DISSENTING OPINION 62

§ 4.05 THE AFTERMATH 62

§ 4.06 THE *AGINS* TEST 63

[A] The Uses of *Agins* 64

[B] The Aftermath of *Agins* 65

[C] Using *Penn Central* and *Agins* 66

§ 4.07 THE JUST COMPENSATION REQUIREMENT 66

[A] Computation Methods 67

§ 4.08 SUMMARY OF THE LAW OF DUE PROCESS AND TAKINGS 67

Chapter 5 TEMPORARY REGULATORY TAKINGS 69

§ 5.01 BACKGROUND 69

§ 5.02 *FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE v. LOS ANGELES COUNTY* 70

[A] The Facts 70

[B] The Holding 71

[C] The Dissent 73

[D] Effects of *First English* on Other Supreme Court Cases 73

[E] The Exception for Normal Administrative Delay 74

TABLE OF CONTENTS

§ 5.03 *FIRST ENGLISH* AND MORATORIA 75

§ 5.04 DETERMINING THE TIME OF THE TEMPORARY TAKING 75

§ 5.05 MEASURING REGULATORY DAMAGES 77

§ 5.06 OFF-SETTING THE TAKINGS AWARD 78

§ 5.07 THE EFFECTS OF *FIRST ENGLISH* ON ZONING
ADMINISTRATION 79

§ 5.08 RIPENESS AND REGULATORY TAKINGS 80

§ 5.09 SECTION 1983 ACTIONS 80

§ 5.10 *FIRST ENGLISH* ON REMAND 81

§ 5.11 GOVERNMENTAL CONFUSION AND BAD FAITH 82

§ 5.12 STATE TAKINGS LEGISLATION 83

Chapter 6 THE STRUCTURE OF ZONING: THE *EUCLID* CASE . . 85

§ 6.01 INTRODUCTION 85

§ 6.02 *VILLAGE OF EUCLID v. AMBLER REALTY COMPANY* 87

§ 6.03 A POST-*EUCLID* PRESUMPTION OF VALIDITY 92

§ 6.04 SOME BACKGROUND ON *EUCLID* 92

§ 6.05 A PRESUMPTION + A RATIONAL BASIS = DEFERENCE 93

§ 6.06 THE REMEDY 93

§ 6.07 THE DISTRICT COURT OPINION IN *EUCLID* 94

**Chapter 7 EUCLIDIAN LAND-USE CONTROLS AND NON-
CONFORMING USES 97**

§ 7.01 ZONING AND PLANNING 97

§ 7.02 ACCESSORY USES 102

§ 7.03 NON-CONFORMING USES 106

 [A] Amortization 110

 [B] The Natural Expansion Doctrine 113

 [C] Changes in Use 114

Chapter 8 AESTHETICS AND ZONING 117

§ 8.01 THE POLICE POWER AND AESTHETICS 117

§ 8.02 HISTORIC DISTRICTS 120

§ 8.03 PRESERVATION OF HISTORIC LANDMARKS 122

 [A] Landmark Interior Regulation 124

 [B] Landmark Designation Procedures 125

§ 8.04 AESTHETICS AND INCENTIVE ZONING 126

§ 8.05 AESTHETICS AND BILLBOARDS 127

 [A] How Can Cities Like San Diego Respond to *Metromedia*? 128

§ 8.06 LOW-INCOME NEIGHBORHOODS AND BILLBOARDS 131

TABLE OF CONTENTS

§ 8.07 A BAN ON BILLBOARDS 131

Chapter 9 MORATORIA AND GROWTH CONTROLS 133

§ 9.01 MORATORIA 133
 [A] Statutory Prohibitions on Moratoria 136
 § 9.02 INTERIM ZONING CONTROLS 136
 § 9.03 GROWTH CONTROLS 137
 § 9.04 THE RAMAPO PLAN 139
 [A] Summary 141
 [B] Open Issues 142
 [C] Creating Sounder *Ramapo* Plans 142
 [D] Development Options 145
 § 9.05 CONCURRENCY 146
 § 9.06 LARGE LOTS AND GROWTH CONTROLS 146
 § 9.07 THE PETALUMA PLAN 147
 [A] Challenging a Petaluma-Like Ordinance 149
 § 9.08 GROWTH CONTROLS AND UTILITIES 150
 § 9.09 INTER-GOVERNMENTAL GROWTH CONTROL COOPERATION . 152
 § 9.10 GROWTH CAPS 152
 § 9.11 URBAN BOUNDARIES 154

Part 2 THE ZONING FORMS OF ACTION 155

Chapter 10 ADMINISTRATIVE RELIEF FROM ZONING ORDINANCES 157

§ 10.01 DEFINITIONS AND INTRODUCTION 157
 § 10.02 THE VARIANCE 158
 [A] Two Types of Variances 160
 [1] Use Variances 160
 [a] Differences in Analysis between Use and Area Variance 161
 [2] Hybrid Variances 161
 [B] Variances and Takings Law 162
 [C] Proof of a Hardship 163
 [D] The Burden of Proof and Substantial Evidence 164
 [E] Two Statutes Compared 165
 [F] Variances as an Administrative Remedy 167
 [G] The Board and Legislative Judgments 168
 [H] Variances and Social Benefits 169
 [I] Variance Conditions and Remedies 169
 [J] The Self-Created Hardship 170
 [K] Variances from Special Exceptions 172

TABLE OF CONTENTS

§ 10.03	SEEKING A SPECIAL EXCEPTION	172
[A]	Generalized Mop-Up Criteria for Special Exceptions	176
[1]	“No Adverse Impact” Criteria	177
[2]	Specific and General Criteria	177
[B]	Legislative Review of Special Exceptions	178
[C]	Special Exceptions with Variances Attached	178
[D]	Special Exceptions and Non-Conforming Uses	179
[E]	Procedural Due Process	179
§ 10.04	ADMINISTRATIVE APPEALS	180
Chapter 11	SEEKING A REZONING	183
<hr/>		
§ 11.01	INTRODUCTION	183
§ 11.02	TWIN PRESUMPTIONS	183
§ 11.03	TESTS FOR THE VALIDITY OF A REZONING	184
§ 11.04	SPOT ZONING	185
§ 11.05	REZONING OR SPECIAL EXCEPTION?	187
§ 11.06	GENERAL CONSIDERATIONS IN REZONING: A SUMMARY	187
§ 11.07	EVIDENCE NEEDED FOR A REZONING	188
§ 11.08	THE CHANGE/MISTAKE RULE	188
§ 11.09	PLANNING STUDIES AND DOCUMENTS AS JUSTIFYING A REZONING	189
§ 11.10	INDIVIDUAL VS. CUMULATIVE CHANGE	190
§ 11.11	INVALID REASONS FOR A REZONING	190
§ 11.12	DRAFTING A COMPLAINT TO CHALLENGE A REZONING AMENDMENT	191
§ 11.13	REZONING “IN ACCORD WITH THE COMPREHENSIVE PLAN” AND ENVIRONMENTAL LAW	191
§ 11.14	THE <i>FASANO</i> DOCTRINE	193
[A]	The <i>Fasano</i> Doctrine in Other States	195
[B]	Some Open Issues	197
§ 11.15	DISTINGUISHING MUNICIPAL LEGISLATIVE FROM ADMINISTRATIVE ACTIONS	197
§ 11.16	REMEDIES FOR A DENIAL OF REZONING	198
§ 11.17	THE NEED FOR UNIFORMITY IN THE STANDARD OF REVIEW	199
Chapter 12	NON-EUCLIDEAN REZONING: ADMINISTRATIVE FLEXIBILITY IN ZONING	201
<hr/>		
§ 12.01	CONTRACT ZONING	201
§ 12.02	CONDITIONAL ZONING	202
[A]	Testing Conditional Zoning	204
[B]	The U.S. Supreme Court and Conditional Zoning	205

TABLE OF CONTENTS

[C] Enabling Act Authority 206

§ 12.03 FLOATING ZONES 207

§ 12.04 PLANNED UNIT DEVELOPMENTS 208

[A] The Standard of Review for PUD Approvals 211

[B] The *Fasano* Rule 212

[C] Challenges to PUD Ordinances 213

[D] Staged PUDs 215

§ 12.05 TRANSFERABLE DEVELOPMENT RIGHTS 215

[A] TDR Documents 217

Chapter 13 JUDICIAL REVIEW OF ZONING ACTIONS 219

§ 13.01 SOME PROCEDURAL PROBLEMS 219

[A] Standing 219

[B] “Aggrieved Party” Status 221

[C] Standing of Neighborhood Citizens’ Associations 223

[D] A BZA’s Standing to Appeal 224

[E] Standing in Federal Civil Rights/Zoning Litigation 225

[1] Round One 225

[2] Round Two 226

§ 13.02 EXHAUSTION OF REMEDIES 227

§ 13.03 RIPENESS 228

[A] United States Supreme Court Opinions on Ripeness 229

[B] Premature Takings Claims 230

[C] Open Questions 232

§ 13.04 SECTION 1983 FEDERAL DUE PROCESS ACTIONS 232

Chapter 14 SUBDIVISION REGULATIONS, IMPACT FEES, LINKAGE FEES, AND EXACTIONS 235

§ 14.01 URBAN FORMS 235

§ 14.02 THE SUBDIVISION PROCESS 236

§ 14.03 THE SUBSTANCE OF REGULATION 239

§ 14.04 VESTING AN ENTITLEMENT TO APPROVAL 241

§ 14.05 THE MATTER OF THIRD PARTY LIABILITY 242

§ 14.06 THE EXTENT OF REGULATION 243

§ 14.07 THE TIMING OF REGULATION 243

§ 14.08 EXACTIONS OF LAND AND MONEY 244

§ 14.09 OVERLAPPING JURISDICTIONS 244

§ 14.10 PREMATURE SUBDIVISION OF LAND 245

§ 14.11 THE PLAT MAP 245

§ 14.12 THE MERGER OF PARCELS 246

§ 14.13 TESTS FOR VALIDATING SUBDIVISION REGULATIONS 246

TABLE OF CONTENTS

§ 14.14	ENFORCEMENT OF SUBDIVISION REGULATIONS	249
§ 14.15	SUMMARY OF SUBDIVISION FEE RATIONALES	249
§ 14.16	IMPACT FEES	251
§ 14.17	LINKAGE FEES	254
§ 14.18	OFFICIAL MAPS AS AN AID IN SUBDIVISION REGULATION	255
§ 14.19	STATE SUBDIVISION STATUTES	257
§ 14.20	DEVELOPMENT EXACTIONS AND TAKINGS	257
[A]	<i>Nollan v. California Coastal Commission</i>	258
[1]	The Facts	258
[2]	The <i>Loretto</i> Citation	259
[3]	Locating This Holding Amid Prior Takings Cases	260
[4]	<i>Nollan</i> 's Impact on Subdivision Regulations	261
[5]	Other Possible Impacts of <i>Nollan</i>	262
[6]	<i>Nollan</i> as Precedent	262
[7]	Two Later Supreme Court Discussions of <i>Nollan</i>	264
[B]	<i>Dolan v. City of Tigard</i>	265
[1]	The Facts	265
[2]	The <i>Dolan</i> Majority	265
[3]	Three Implications of <i>Dolan</i>	267
[4]	Testing the Limits of <i>Dolan</i>	268
[5]	<i>Dolan</i> and Subdivision Exactions	269
[6]	Planning and Statistics after <i>Dolan</i>	269
[7]	The Doctrine of Unconstitutional Conditions	270
[8]	Impact Fees and <i>Dolan</i>	271
[9]	A Later Limitation	274
§ 14.21	SUMMARY	274

Part 3 ECONOMIC DISCRIMINATION AND ZONING 277

Chapter 15 EXCLUSIONARY ZONING 279

§ 15.01	INTRODUCTION	279
§ 15.02	EXCLUSIONARY ZONING DEFINED	279
§ 15.03	THE BASIS FOR THIS DOCTRINE	281
§ 15.04	JUDICIAL REMEDIES	281
§ 15.05	THE <i>MOUNT LAUREL</i> LITIGATION	282
[A]	Stage One	282
[B]	Stage Two	284
[1]	Stages One and Two Compared	285
[2]	Two Litigation-Related Tactical Considerations	286
[3]	Some Political Tactics	286
[C]	Stage Three	287

TABLE OF CONTENTS

[1] Some Legislative History 287

[2] COAH Proceedings 288

[3] Administrative Response to the Act 289

[4] How Successful is the *Mount Laurel* Doctrine? 289

§ 15.06 FAIR SHARE HOUSING DOCTRINES IN OTHER STATES 290

[A] *Britton v. Town of Chester* 290

§ 15.07 INCLUSIONARY ZONING 292

§ 15.08 APPEALS OF AFFORDABLE HOUSING PERMIT DENIALS 294

§ 15.09 CONCLUSION 297

Chapter 16 CIVIL RIGHTS AND EXCLUSIONARY ZONING 299

§ 16.01 INTRODUCTION 299

§ 16.02 CONSTITUTIONAL CLAIMS 299

§ 16.03 FEDERAL FAIR HOUSING ACT CLAIMS 301

[A] Two Applications of the *Arlington Heights II* Four-Prong Test 302

[B] *Huntington Branch, NAACP v. Town of Huntington* 303

[1] Applying *Huntington Branch* 305

[C] Rezoning Remedies 305

§ 16.04 DISCRIMINATION AGAINST THE HANDICAPPED 305

§ 16.05 CONCLUSIONS 308

§ 16.06 THE FAIR HOUSING ACT AND PRIVATE COVENANTS 308

§ 16.07 FHA VIOLATIONS MUST BE DEVELOPMENT BASED 309

§ 16.08 CIVIL RIGHTS AND ENVIRONMENTAL JUSTICE 309

Part 4 WETLANDS AND BEACHES 311

Chapter 17 PROTECTION OF SENSITIVE LANDS 313

§ 17.01 WETLANDS 313

[A] Defining Wetlands 314

[B] State Regulation 315

[C] Federal Regulation 317

[1] Corps Jurisdiction and State Programs 319

§ 17.02 THE PUBLIC TRUST 320

§ 17.03 BEACHES 321

§ 17.04 TOTAL TAKINGS 321

[A] The Facts 321

[B] The State Supreme Court Opinion 322

[C] The United States Supreme Court — The Majority Opinion 322

[1] *Lucas and Penn Central* 323

[2] The Nuisance Cases 323

[3] Total Taking Analysis 324

TABLE OF CONTENTS

[4]	<i>Euclid</i> and <i>Lucas</i>	326
[5]	“Background” Law in State Courts	328
[6]	What <i>Lucas</i> Does Not Decide	329
[a]	Footnote 7	329
[b]	Discrete Rights	330
[c]	Worthless or Unsuitable?	331
§ 17.05	TAKINGS CLAIMS — <i>PER SE</i> AND BALANCING CASES	331
§ 17.06	FEDERALISM AND CATEGORICAL TAKINGS	332
<hr/>		
Part 5	REGULATING THE USER, NOT THE USE	335
<hr/>		
Chapter 18	“FAMILY” AND GROUP HOMES	337
<hr/>		
§ 18.01	DEFINING A “FAMILY” IN A ZONING ORDINANCE	337
§ 18.02	A BETTER DEFINITION	341
§ 18.03	GROUP HOMES AND OTHER “FAMILIES”	342
§ 18.04	GROUPS HOMES FOR THE MENTALLY DISABLED AND THE EQUAL PROTECTION CLAUSE	343
[A]	Determining the Level of Review	344
[B]	Reviewing the Ordinance	344
[C]	The Line Between <i>Boraas</i> and <i>Cleburne</i>	346
<hr/>		
Chapter 19	THE FIRST AMENDMENT AND ZONING	349
<hr/>		
§ 19.01	INTRODUCTION	349
§ 19.02	SEX BUSINESSES	349
[A]	<i>Renton v. Playtime Theatres</i>	350
[B]	Content-Neutral Ordinances	353
[1]	The Governmental Interest and Content Neutrality	353
[2]	Accessibility	354
[C]	<i>City of Los Angeles v. Alameda Books</i>	357
§ 19.03	BILLBOARD REGULATION	359
§ 19.04	ZONING AND RELIGION	361
[A]	Churches and Landmarks	363
<hr/>		
Chapter 20	DEMOCRACY AND ZONING: THE PLACE OF THE REFERENDUM	365
<hr/>		
§ 20.01	INTRODUCTION	365
§ 20.02	<i>EASTLAKE v. FORREST CITY ENTERPRISES</i>	365
[A]	Reconciling <i>Eastlake</i> with Equal Protection Cases	367
[B]	Legislative vs. Judicial Decisions	368
[C]	Legislative vs. Administrative Decisions	368

