

Land Use and Zoning Law

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Planning for Accessible Communities

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For
Margaret, Gina, Giovanni,
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Preface

This book educates the user on basic land use and zoning law while simultaneously addressing an emerging area of legal practice identifiable as land use law and disability. No other casebook systematically addresses the issues of aging in place and of disability in the context of local land regulation. Other land use books have integrated environmental law, economic analysis, and public policy, but this is the first book to deal with legal issues at the intersection of land use and disability law. This integrated approach is important because twenty to thirty percent of American families have a family member with a mobility impairment. Mobility impairments increase with age, and America's population is aging at a rapid pace, with many cities having twenty-five percent or more of their population age sixty years or older. Therefore, property development and land use regulation must account for changing demographics, and land use and zoning professionals must work to make the built environment safe and easy to navigate for people with disabilities and for people aging in place.

Importantly, the book is designed to be readily usable by people with little or no expertise in disability law. The key elements of disability law are addressed in the text and in the cases. The sections of disability law that are most important in land use and zoning are very limited in number. For the most part, they deal with matters of discrimination, and with requirements of providing a reasonable accommodation and modification to programs, services, and activities of local governments. To this end, the book covers all of the traditional areas of land use regulation and zoning law while highlighting the importance of making communities accessible for people with disabilities and for people aging in place. Issues of accessibility, at the intersection of land use law and disability, are emerging as significant new topics of legal conflict. Many lawyers and land use professionals mistakenly think of accessibility only in terms of universal design and fail to appreciate the land use and zoning law implications. From the legal perspective, it is important to keep in mind that accessible communities involve more than universal design. Design issues are a part of accessibility, but land use and zoning law involves a specialized area of property law dealing with the regulation of property development and land use. Design issues are generally within the expertise of architects and similar planning professionals, but questions regarding land use and the applicability of laws designed to protect the elderly and people with disabilities are primarily the responsibility of lawyers. Lawyers have the expertise to determine the application of the Rehabilitation Act (RHA), the

Fair Housing Act (FHA), and the Americans with Disabilities Act (ADA), to issues of land use and zoning. Lawyers are also the professionals needed to determine when requests for reasonable accommodations and reasonable modifications to planning and zoning practices are legally required. There are many legal questions arising in the land use and zoning area that have little or nothing to do with design and a lot to do with accessibility. This book prepares the reader to understand these issues while simultaneously learning the law of land use and zoning. It does this primarily by including many land use and zoning cases that address issues of disability and of aging in place.

In addition to being the first land use and zoning law casebook to comprehensively integrate issues of accessibility and the ADA, the book offers several unique features. Prior to each subsection of the book, a brief paragraph orients the reader to the material that follows. After each case, there are sections identified as **Questions for Consideration** and **Takeaway**. In addition, at the end of each chapter there are **Practice Problems**. The **Questions for Consideration** are not problems; they are straightforward questions designed to focus the reader's attention on key elements of the case. The questions will assist the reader in thinking about the case and facilitate preparation for further thought and discussion. The **Takeaway** section presents concepts and practice pointers relevant to the case. It is anticipated that many more questions and takeaways can be generated by the users of this book; thus, these features are designed as facilitators for additional discussion and investigation. Finally, at the end of each chapter, there are **Practice Problems**. These problems provide an opportunity for the reader to apply his or her knowledge. They offer an opportunity to test the reader's knowledge of what is being learned in the materials, and they are designed to be practice oriented in terms of questions that might arise for a law clerk or new associate in a law practice. When **Practice Problems** are assigned to students to write up and discuss, they can provide an ideal opportunity for assessing student progress in the course. They will provide an assessment tool for comprehension, and the execution of a written assignment can facilitate assessment of research skills as well as communication skills. In many problems, students are directed to locate and analyze local zoning regulations and state statutes. The questions place students in different legal positions requiring them to consider how their role may affect their analysis. The **Practice Problems** permit evaluation of a student's ability to understand facts and apply rules and regulation to these facts. They also provide writing opportunities that permit assessment of a student's ability to convey information in a clear and focused way. Every chapter ends with three **Practice Problems**. It is not my intention that all problems will be assigned in a given semester. A number of problems are provided so that there are choices and opportunities to select different problems for different purposes, and to have choices to rotate when the book is used in different semesters. Ideally, an instructor will select some problems for in-class discussion and assign one or more to be written up over the course of a semester for purposes of assessment. In such a case, an instructor may use the written responses along with the use of a final examination and class participation to develop an

overall assessment of a student's progress in the course (allocating appropriate credit for the written assignments such that the course grade reflects an evaluation of multiple skills).

More generally, the overarching structure of the book is focused on land use and zoning law as an exercise of governmental police power. The book starts from the position of property rights as important to traditional ideas of freedom and wealth formation. It then considers problems related to externalities, spillover effects, and the difficulties of self-coordination of land uses in an increasingly complex world. Chapter one provides an overview on issues related to accessibility and the Americans with Disabilities Act (ADA). This chapter will provide a clear context for the remaining materials in the book. Beginning with chapter two and continuing into chapter three, the materials focus on the exercise of the police power and its limitations. The traditional limits to the exercise of the police power discussed in chapter three include: due process, equal protection, and the Takings Clause. Chapter four covers the relationship between comprehensive planning and zoning. In chapter five, the material expands on our understanding of the limits of the exercise of the police power. The focus in chapter five is on limitations imposed by tensions with other fundamental rights, such as those related to free speech, freedom of association, freedom of religion, and the rights of people with disabilities. Chapter six addresses a variety of standard concepts central to a land use and zoning law practice. It also includes discussion of fair housing, discrimination, and the imposition of exactions. Takings law is discussed in several chapters rather than as a "stand alone" topic. In instances where a limited number of cases are used to illustrate a point, I have selected well-known classic cases and cases that discuss other key cases within their opinions. This permits greater coverage of important concepts with the use of fewer total cases.

Prior to undertaking the writing of this casebook, I used a variety of available casebooks in teaching my land use and zoning course over a number of years. My experience in using these books revealed two things. First, some of these books, while good, covered too much material and went into too much depth for most of my students. The material was difficult to cover in a one semester course without cutting chapters. With this in mind, I have attempted to write a short book consisting of carefully edited cases that cover the key elements of zoning. The book is designed to be introductory and to fully integrate land use and disability law. The entire book should be able to be covered in a one semester course. Second, I felt that many of the books I had used failed to connect students with the human element of land use and zoning law. I find that my students enjoy land use cases that connect land regulation to other important social issues such as disabilities, aging in place, group homes, free speech, freedom of religion, and affordable housing. By focusing my casebook on the intersection of land use law and disability, the materials continuously engage students with the human aspects of regulating our built environment. Importantly, I intentionally decided not to write a land use and zoning book with a chapter specifically dedicated to issues of disability. I have written a book that integrates disability

related issues across the spectrum of land use and zoning law. This is consistent with my commitment to inclusion more generally. Disability is not simply a subtopic of interest like historic preservation, agricultural land protection, and coastal land management; disability issues permeate everything we do with respect to the built environment. Consequently, while all of the core elements of land use and zoning law are covered in this book, the book does not veer down all of the same paths mapped out in other books. The focus is on core concepts, and on educating zoning lawyers about disability law so that they are prepared to be active participants in shaping accessible and livable communities; communities that are safe and easy to navigate by people with disabilities and for people seeking to age in place.

In using my materials, students often comment that they never knew that land use and zoning law could touch so many people in so many ways. Many of my students also identify with the problems confronted by people with disabilities, and they share personal stories with me and with the class about themselves and their family members who have experienced difficulties navigating the built environment. My materials offer a different perspective on land regulation while providing a firm foundation for both land use and disability law.

In my course, I extend the casebook materials by assigning **Practice Problems**, and by having my students answer questions using a local municipal zoning code, comprehensive plan, and zoning map. I select properties in the community and create problems concerning zoning matters such as a request for a variance concerning the property. Students enjoy actually locating, using, and applying local codes, maps, and plans to solve problems related to properties that they can drive by as well as locate on google maps. I also require students to attend a day of hearings of a local zoning board of appeal and prepare a report on the proceedings they observe. All of this helps to make the course more interesting to my students.

In preparing this casebook, I selected the best cases to achieve the goals of the book. The cases are edited for educational purposes, and internal case citations have been minimized so that the cases are easier to read. I used drafts of these materials in two different teaching cycles in order to ensure satisfaction with the editing and organization of the book. I have used these materials with both first year law students and upper level law students. I find that while the pace varies between first year and upper level students, all students can effectively use and learn from these materials. My assessments of student progress in using the materials indicates that students not only develop a strong foundation in land use and zoning law, they also develop a firm grasp of the unique issues confronting people with disabilities and people seeking to age in place. In offering upper level students advanced opportunities to do specialized projects on land use and zoning topics, I find that they are all well equipped to engage in further research and that they are prepared to tackle complex legal matters.

In preparing these materials, I benefited from the research assistance of several students, and I wish to thank them for their dedicated work as my research assistants. They are Emily Keable, Jaqueline Kim, Parker Mincy, Sarah Spencer, and Maria

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For additional information on Land Use Law and Disability see:

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