I. COURSE DESCRIPTION

As a scarce and necessary resource, land triggers competition and conflict over its possession and use. For privately owned land, the market manages much of the competition through its familiar allocative price-setting framework. However, because one person’s use of privately owned land affects the individual and collective interests of others and because market mechanisms alone are not always adequate to protect or promote such interests, laws enacted by legislative bodies, administered by government agencies, and reviewed by courts play a significant role in determining the use of land.

Encompassed in local ordinances, higher-level legislation, administrative rules, constitutions, judicial opinions, discretionary governmental decisions, and private agreements, land use laws and environmental laws shape the look, feel, and socio-economic dynamics of cities, suburbs, and rural areas worldwide. For example, zoning’s use restrictions affect whether neighborhoods are homogeneous or heterogeneous, its density and lot area restrictions scatter or cluster housing, its height and setback restrictions sculpt the skyline. Environmental laws govern the extent to which land uses pollute air, water, and land, whether habitat is available for endangered species, whether wetlands are preserved, and whether individuals build in areas vulnerable to floods, hurricanes, forest fires, and earthquakes.

Five critiques commonly track present-day applications of land use and environmental laws in the United States. One critique asserts that traditional zoning prevents the creation of communities best suited for the needs of modern-day populations at home and work. A second critique asserts that land use and environmental laws exact too heavy a toll on market operations and private property rights in ways harmful to individuals at all income levels. A third critique condemns the capture of land use and environmental laws by parochial interests, to the detriment of citywide and regional interests as well as those of lower income individuals. A fourth critique claims that land use laws stifle design creativity. A fifth critique sees the existing land use and environmental law regime as inadequately addressing the existential threat of climate change. Variations of some or all five critiques exist in countries around the world.
This is a course about land use laws and environmental laws, introducing students to their content and controversies. Although the course operates on the assumption that incoming students have no legal knowledge or background, those with a background in law can also benefit. Students will gain a working knowledge of popular legal techniques, their implementing institutions, and their judicial reception, along with an understanding of theories that explain and justify the demand for law’s control over privately owned land. For pedagogical reasons, laws from the United States will be used as primary sources, but comparisons and distinctions with laws in other countries will be regularly made. Particular attention is paid to the impact of land use and environmental laws on physical development patterns that themselves impact social, economic, and aesthetic outcomes, to the increasing overlap between land use law and environmental law, and to the tensions between individual and collective rights that sometimes find their resolution in the courtroom under constitutional and other doctrines.

The role of non-lawyer professionals, such as planners, designers, public policymakers, real estate developers, and community activists, in influencing, drafting, and implementing land use and environmental laws, is unpacked. The course defines and distinguishes law’s method from those employed by other disciplines and fields. Reading assignments come from primary sources, such as legislation, judicial opinions, and constitutions, as well as secondary sources such as law review articles, journal articles, book excerpts, and professional reports. A written exercise requires students to examine one provision in a zoning ordinance and draft its replacement. An oral final exam will measure overall fluency with the subject matter.

The following laws are explored in the course:

- nuisance law
- “traditional” zoning
- “modern” zoning (planned unit developments, cluster zoning, special districts, special permits, contextual zoning)
- “contemporary” zoning (form-based codes, traditional neighborhood development codes)
- development approval processes
- subdivision controls
- growth management laws (caps, phased growth, moratoria, growth boundaries, adequate public facilities, concurrency)
- developments of regional impact and areas of critical state concern
- environmental impact reviews
- water pollution laws
- air pollution laws
- wetlands laws
- brownfields laws
- endangered species laws
- environmental justice laws
- natural disaster, climate change, and sustainability laws
- public trust doctrine
- performance zoning
- incentive zoning
- inclusionary zoning
- linkage
• exactions and impact fees
• community benefit agreements
• transfer of development rights
• design review and guidelines
• historic preservation laws
• billboard and sign laws
• adult entertainment laws
• freedom of religion laws
• eminent domain
• fair housing laws
• constitutional doctrines applied to government regulation of private property ( takings and just compensation, due process, equal protection, freedom of speech, freedom of religion)

II. COURSE REQUIREMENTS

A. Class Attendance and Participation
Students are expected to attend classes and participate in discussions. Students must participate in class discussion at least twice during the semester at times of their own choosing.

B. Reading Assignments
Students are asked to spend an average of two hours per class on reading assignments, posted on the Canvas course website.

C. Zoning Exercise
The written Zoning Exercise asks students to choose a provision from the Cambridge, Massachusetts zoning ordinance, analyze and critique its on-the-ground impact, and draft an amendment to improve or substitute for that provision. The exercise is 1,000 words, excluding word count for the draft amendment and graphics.

D. Final Exam
The Final Exam is an oral exam administered at Gund Hall at a scheduled time during the Design School’s final exam period, December 11-14. The precise date will be announced as soon as the school administration sets it several weeks into the semester.

E. Grading
The Zoning Exercise and Final Exam each count for 50% of the grade. Effective class participation may increase a grade at the margin.

III. COURSE SCHEDULE

1. Wednesday, August 30: Introduction to the Theory and Practice of Land Use Law and Environmental Law
   • What is law?
   • Law makers, law administrators, law reviewers
• Role of non-lawyers and lawyers
• Law versus policy
• How does law compare with other disciplinary and professional approaches?
• Justifications and critiques of land use law and environmental law

**Required Reading:**

1. Jerold S. Kayden, “Why Implementation Matters,” *Harvard Design Magazine*, No. 37 (Winter 2014) (If you don’t have a chance to read this article before attending the first class, that is fine but do read it thereafter.)

**Background Reading:**


**Monday, September 4: No class, Labor Day Holiday**

**2. Wednesday, September 6: What Is Property?**

• Who owns the fox?
• Who owns land?
• What are the “rights” “owned” in land?

**Required Reading:**

1. *Pierson v. Post*, 3 Caines 175 (N.Y.S.Ct. 1805)


**Background Reading:**


• What is the common law?
• What is judge-made law?
• Objective versus subjective standards
• First in time first in right
• Balancing tests
• Law and economics
• Policy considerations

Required Reading:


Background Reading:


4. Wednesday, September 13: The Origins of Zoning and Its Relation to Planning

• Purposes
• Districts
• Uniform treatment
• Relationship to planning
• Relationship to public infrastructure investments
• State and local powers

Required Reading:


Background Reading:


5. Monday, September 18: “Traditional” Zoning

NOTE: Zoning Exercise is assigned today, due Monday, October 30

- The zoning trio: use, density, shape
- The zoning map
- Non-conforming uses
- Variances
- Amendments
- Enforcement
- Subdivision

**Required Reading:**

1. Skim the *entire* Cambridge Zoning Ordinance, located on-line, to understand how a typical local zoning law controls the use of privately owned land. As you are reading, consider what parts of the ordinance interest you for purposes of the Zoning Exercise.


3. Massachusetts Subdivision Control Law, Chapter 41, Section 81L

**Background Reading:**


- What is the police power?
- Substantial relation to public health, safety, morals, or general welfare
- Arbitrary and capricious
- Presumption of validity and fairly debatable
- Role of judges

**Required Reading:**

1. Excerpts from United States Constitution: Due Process Clause, Equal Protection Clause


**Background Reading:**


- Police power versus eminent domain power
- Due process versus takings
- Average reciprocity of advantage
- “Goes too far”
- *Penn Central* three-part test: economic impact, distinct investment-backed expectations, character of the governmental action
- “Parcel as a whole” and the “denominator” question
- Denial of all economically viable, beneficial, productive, or feasible use
- Background principles of property or nuisance law
- Public Trust Doctrine
- Physical invasions
- Public use
- Just compensation
- Ripeness
- Vested rights
- State constitutions
- Property rights legislation

**Required Reading:**


**Background Reading:**


3. *Just v. Marinette County*, 56 Wis.2d 7, 201 N.W.2d 761 (1972)

8. Wednesday, September 27: “Modern” Zoning: Planned Unit Developments, Cluster Zoning, Special Districts, Special Permits

- How uniform is uniformity?
- Rule (as-of-right/matter-of-right/by-right) versus discretion
- Illegal “spot zoning”

**Required Reading:**


**Background Reading:**


7. Massachusetts Zoning Act, Chapter 40A, Section 9


9. Monday, October 2: The Development Approval Process

   - Should neighbors and neighborhoods be given a louder voice?
   - NIMBY (not in my back yard), BANANAS (build absolutely nothing anywhere near anything), NDMTO (not during my term of office)

   **Required Reading:**


   2. New York City, Uniform Land Use Review Procedure (ULURP)

10. Wednesday, October 4: “Contemporary” Zoning: Traditional Neighborhood Development (TND) Ordinances, Form-Based Codes

   - What’s new?
   - New Urbanism’s engagement with implementation (law, finance, politics)
   - What about use?

   **Required Reading:**

2. Ordinance No. O-11-88, Kentlands, Maryland (adopted by City Council of Gaithersburg, Maryland, Nov. 7, 1988)

3. Traditional Neighborhood Design Guidelines (undated)


Background Reading:


11. Monday, October 9: Local Growth Management

- Is there an obligation to grow and provide infrastructure?
- Caps and Phasing
- Concurrency, Adequate Public Facilities, Infrastructure Schedules
- Moratoria
- Fiscal zoning
- Local versus regional

Required Reading:


Background Reading:

12. Wednesday, October 11: Exclusionary Zoning

- Income and race
- Intent and effect
- What is a family?
- Fair share
- Regionalism
- Role of judges
- Locally Unwanted Land Uses (LULUs) and Not In My Back Yard (NIMBY)
- Fair Housing

**Required Reading:**


3. United States Department of Housing and Urban Development, *AFFH Fact Sheet: The Duty to Affirmatively Further Fair Housing* (undated)

**Background Reading:**


13. Monday, October 16: Exactions, Impact Fees

- Essential nexus
- Rough proportionality
- Legislative rule versus case-by-case discretion
- Planning studies

**Required Reading:**


**Background Reading:**


14. **Wednesday, October 18: Inclusionary Zoning and Linkage**

- Contrast with “exclusionary” zoning
- Mandatory versus mandatory with sweetener versus voluntary
- Planning studies
- On-site versus off-site
- “Poor door” and equal quality of development

**Required Reading:**

1. New York City, Mandatory Inclusionary Housing Zoning Text, March 24, 2016, skim the entire law


**Background Reading:**


15. **Monday, October 23: Incentive Zoning and Transfer of Development Rights**

- Market-based approaches
- Zoning for sale
- How to determine the nature of “voluntary”?
- Competition between incentive zoning and TDR
- Value capture and value sharing

**Required Reading:**


**Background Reading:**


16. Wednesday, October 25: Regional Growth Management

- “Smart growth”
- State laws
- Regional agencies
- Developments of Regional Impact
- Areas of Critical State Concern
- Urban growth boundaries
- Overlap with environmental law regimes

**Required Reading:**


**Background Reading:**


17. Monday, October 30: The Theory and Practice of Environmental Laws and Institutions: From Legislation to Administrative Action to Judicial Review

**NOTE:** *Zoning Exercise* is due in class.
・ Relationship between environmental law and land use law
・ Goal-setting and the place of science, economics, politics
・ Command and control vs. market-based regulatory approaches
・ Rules
・ Cost-benefit analysis
・ Judicial review
・ Substantial evidence
・ Role of citizens and non-governmental organizations
・ Levels of government

**Required Reading:**

1. James Salzman and Barton H. Thompson, Jr., *Environmental Law and Policy, 4th Edition* (Foundation Press 2014), pp. 3-49 (Introduction to Environmental Law and Policy and Perspectives on Environmental Law and Policy); 51-86 (The Practice of Environmental Protection); 87-108 (Enforcement)


**Background Reading:**


**18. Wednesday, November 1: Environmental Impact Reviews**

・ Advisory versus substantive
・ Instrumental use of statutes
・ How does it compare to land use development reviews?
・ State copycats

**Required Reading:**

2. National Environmental Policy Act of 1969, 42 USC Section 4331

3. Massachusetts Environmental Policy Act, Ch. 30, Sec. 61

4. Woodland Village Environmental Notification Form, October 28, 2011

5. Proposed Medical Office Building Environmental Notification Form, October, 2011


19. Monday, November 6: Air Pollution and Water Pollution from Land Uses

- Single media
- Metropolitan planning organizations (MPO)
- Planning scales
- VMTs and land performance
- Pollution permits and trading
- Non-point source water pollution
- Right to farm
- Performance zoning

Required Reading:

1. James Salzman and Barton H. Thompson, Jr., Environmental Law and Policy, 4th Edition (Foundation Press 2014), pp. 111-139 (Air Pollution), 141-172 (Global Air Pollution), 173-203 (Water Pollution)

2. Excerpts from Clean Air Act, 42 USC Section 7401, skim for basic understanding rather than full mastery

3. Excerpts from Clean Water Act (Federal Water Pollution Control Act Amendments of 1972), skim for basic understanding rather than full mastery

Background Reading:

1. 23 USC Section 134, Metropolitan Transportation Planning, read for basic understanding rather than full mastery


20. Wednesday, November 8: Wetlands, Habitats, Endangered Species, and Land Use

- No net loss
• Expansive use of critical habitat application

**Required Reading:**


2. Excerpts from *Clean Water Act*

3. Excerpts from *Endangered Species Act*

**Background Reading:**


• Strict liability versus negligence
• Joint and several liability
• “Fair” distribution of land uses

**Required Reading:**


3. Excerpts from CERCLA/Superfund laws


**Background Reading:**


**22. Wednesday, November 15: Eminent Domain**

• Definition of public use
• Primary versus incidental purpose
National and state legislation

**Required Reading:**


**Background Reading:**


**23. NOTE:** CLASS WILL BE RESCHEDULED Monday, November 20: Design Review and Historic Preservation

- Design review and design guidelines
- Is it about aesthetics?
- Objective versus subjective
- Compatibility, harmony, consistency
- Individual landmarks and historic districts
- Historic versus community character
- Due process, free speech, takings
- Local, national, international laws

**Required Reading:**


**Background Reading:**


5. *Hanna v. City of Chicago*, Circuit Court Cook County, Illinois, No. 06 CH 19422, May 2, 2013


7. Section 106 of the *National Historic Preservation Act*


**Wednesday, November 22: NO CLASS, Thanksgiving Break**

**24. Monday, November 27: Land Use as Speech and Religion: Billboards, Adult Entertainment, Religious Facilities**

**Required Reading:**


3. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)

**Background Reading:**


**25. Wednesday, November 29: Resilience, Sustainable Development, Climate Change, Natural Disasters**

- Definitions of sustainability, resilience, adaptation, and mitigation
- Buzzwords or meaningful paradigms?
- Energy and land use
- Risk and insurance
- Cumulative impact
- Precautionary principle
- Ethics of planning and design

**Required Reading:**
1. City of New York, *PlaNYC Update* (April 2011), pp. 2-19, then read two chapters from the report


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