January 25, 2016

**Topic 1:** Course Overview, Framework for Land Use Planning and The Origin of Land Use Planning and Control in the United States; Fundamentals of Land Use Planning: A Logical Process

What is land use planning and land use law in America today? What steps should be taken to establish a meaningful and effective ‘plan’? What size region/territory can be “planned”? What laws—if any—should guide the planning process? During this week’s class, we will explore the “ingredients” of a successful plan and debate whether even a properly completed plan can be effective without the employment of regulations and non-regulatory tools. We will discuss techniques of binding local governments to their plans and policies. We will analyze the public process employed in the development of plans and polices and critique their effectiveness, as well as attempt to define “smart growth”. We will discuss the planner’s role in land use planning, land use law and development permit approvals.

February 1*

**Topic 2:** Planning and Plans: The Comprehensive Plan Based on Statutory Requirements
Almost half of the fifty states require local governments to prepare a land use plan as a prerequisite to adopting certain land use controls. What are these plan ingredients and are they successful in ensuring that local governments make decisions in the context of a logical plan? What happens in the non-plan states (e.g. Massachusetts and Connecticut)? Discussion will center on the elements of mandatory planning of various states such as Hawaii, California, Vermont and Rhode Island in comparison with non-plan states such as Massachusetts, as well as the distinction between the “Unitary View”, “The Plan as a Factor” and the “Plan as an Impermanent Constitution”. We will discuss why imposition of regulatory controls in the absence or contravention of a comprehensive plan almost always gives rise to the possibility of a court challenge. We will review the unfortunate experiences of non-plan states as they attempt to impose growth management controls in the absence of comprehensive plan legislation. Text: 33-61. California Building Industry Association v. City of San Jose, 61 Cal.4th 435 (2015), Arbor Properties, Inc. v. Lake Jackson Protection Alliance, Inc. 51 So.3d 502 (2010), Rando v. Town of North Attleborough, 44 Mass.App.Ct. 603 (1998), Lesher Communications, Inc. v. City of Walnut Creek, 802 P.2d 317 (1990), Rancourt v. Town of Barnstead, 129 N.H. 45 (1986), Udell v. Haas, 21 N.Y. 2d 463, (1968) and National Amusements, Inc. v. City of Boston, 29 Mass.App.Ct. 305 (1990). (See also, if of interest: “Legal effect of adopting a comprehensive plan”, 1 Am.Law. Zoning s.5:16 (2015); “Smart Growth: State Strategies in Managing Sprawl”, 45 Urb. Law 349 (2013) and “Comprehensive Planning”, 34 Urb. Law 945 (2002)).

February 8

**Topic 3:** Fundamentals of Land Use Planning: Constitutional Principles: “If a policeman must know the Constitution, then why not a planner?” Justice Brennan, San Diego Gas and Electric Co. v. City of San Diego, 450 U.S. 621 (1981). Several federal and state constitutional provisions and principles, whether implemented at the local, regional or state levels, strictly control land use planning. What are these provisions, how do they work, and what do they mean to the practicing planner? Discussion will focus in detail on the explicit and implied
powers of government to plan—and regulate—for the public good.
What must government(s) do prior to enacting regulations? How can
regulations be challenged and what remedies exist for the challenger?
How can government(s) adopt and enforce regulations that pass
constitutional muster? How have regulations been used (and continue to
be used) to discriminate against individuals, against various land uses,
against adjacent communities? Text: 188-222. Freeman v. Town of
Hudson, 714 F.3d 29 (2013), Brockton Power, LLC v. City of Brockton,
948 F.Supp.2d 48 (2013), Gianfrancesco v. Town of Wrentham, 712
F.3d 634 (2013), Condominium Assn of Commonwealth Plaza v. City of
Chicago, 399 Ill.App. 3d 32 (2010), McLean Hospital Corporation v.
Sebastian, 239 U.S. 394 (1915). See also, but not required, Reed v.

February 18*/22

(*February 18 is a Thursday)

**Topic 4:** How Far Can Government Go? The Takings Issue (2 classes)

Governments are generally empowered to condemn—take—private
property for public uses. While government is often required to pay
more than it originally offered the landowner, few eminent domain
actions are reversed. However, landowner challenges based on
regulatory taking claims are often upheld by state and federal courts and
some local governments have been forced to pay large damage awards to
regulated landowners, whereby the challenged regulation has been
voided as well. These classes will focus on the taking issue and try and
resolve the controversy that has inspired bills at the federal and many
state levels to restrict government’s ability to impose regulatory controls
on private property. Do these proposals conflict with government’s
police power obligations? How far can regulations go in limiting
development before the regulation serves as a “de facto” physical
taking? Is it equitable that government can regulate private property
without paying the landowner for the loss incurred? If so, under what
circumstances? Text: 86-188. Horne et al. v. US Department of
Agriculture, 135 S.Ct. 2419 (2015), Koontz v St. Johns River Water
Management District, 133 S.Ct. 2586 (2013), Arkansas Game and Fish
Commission v United States, 133 S.Ct. 511 (2012), Lingle v. Chevron
USA, 544 US 528 (2005), Agins v. City of Tiburon (no longer “good
law” but please review), 447 U.S. 255 (1980), Gove v. Chatham, 444
Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). (See also,
if of interest, “Land-Use Regulation After Koontz: Will We ‘Rue’ The
Court’s Decision?”, 38 Vt. L.Rev. 743 (2014).

February 29

**Topic 5:** Bringing and Defending a Land Use Case in Court
Land use controversies often endure a torturous path from city hall to
state and federal courts. We will discuss the procedure for appealing
local land use decisions and review how cases get to or thrown out of,
court. We will review trial strategies, pre trial procedural “traps”,
motion practice and issues of standing, exhaustion and ripeness and
remedies available to litigants in land use litigation. Clifton v. Village of
Blanchester, 131 Ohio St.3d 287 (2011), Brooks v. Chelmsford Hillside
Zoning Board of Appeals of Chatham, 459 Mass. 115 (2011), Sweeney
Standerwick v. Zoning Bd. of Appeals of Andover, 447 Mass. 20

March 7, 14, 28

April 4, 11

**Topic 6:** Tools for Land Use Planning (5 classes)
Given the limitation imposed on local governments by state and federal
constitutional rules, what tools—techniques—are available for local
governments as they implement their comprehensive plans or attempt to
protect certain natural or built resources? The following classes explore
these tools in detail. Each class is designed so that the participant
develops a comfortable and working knowledge of the techniques, their
application, their strengths and their limitations. The majority of
regulatory tools to be analyzed fall within the broad category of zoning,
although some discussion will include innovative subdivision control
and health regulations. Discussion begins with an analysis of zoning
authority in a handful of states.


Telecommunications Litigation: Time permitting.

April 25

**Topic 7:** Inclusionary Zoning: "Affordable" Housing

A key element of local land use plans is the provision of affordable housing within the community. “Affordable” is a function of many factors, as affordable in one city or town may be highly un-affordable in another. What have states done to encourage—or require—affordable housing in local governments? What are inclusionary ordinances and how do they work? We will review these questions and present a series of regulatory approaches to mandating affordability. We will explore a range of mechanisms that the Courts, state legislatures and local and state governments have employed to develop affordable housing and will dissect the Massachusetts “Anti-Snob Zoning Law” (G.L. c.40B §§20-23) in detail. Cases: California Building Industry Association v. City of San Jose, 61 Cal.4th 435 (2015)(from Week 2, above), Home Builders Association of Northern California v. City of Napa, 89 Cal.App.4th 897 (2001). Text: 457-527, please obtain a copy of M.G.L. c.40B, ss.20-23 and Jonathan Witten, Adult Supervision Required: The Commonwealth of Massachusetts’s Reckless Adventures with Affordable

May 2  
Course Review and Summary  
We will review the entire semester, leave time for open-ended questions and discussion and discuss the final exam.

**Course Grade:** The course grade is based upon course participation and attendance (60%) and a final, “take home” exam providing an opportunity to respond to a series of practical and commonly recurring land use problems (40%). The exam will be distributed on April 11, 2016 and due on May 6, 2016.

- I am pleased to answer questions raised during the course and discuss matters related to it anytime. I will be on campus Thursdays before class or at other times by appointment. Please feel free to schedule an appointment with me; I am willing to meet with you on campus at your convenience or talk via telephone anytime.
- I am best reached at: 781-934-0084.
- In an emergency, I can be reached at 617-827-9056 (cell).
- My e-mail address is: jon.witten@tufts.edu