

Land Use Law

CMP/REDEV 6260

Spring 2023

3 Credit Hours

CRCC Room 115 & Zoom (<https://utah.zoom.us/j/95460568036>)

Tuesdays & Thursdays

3:40 to 5:00

Class Mode: This class will use a hybrid participation structure, meaning that sessions will be both in person (in room 115 of the Christensen Center) and on Zoom. Students are welcome to choose whichever mode best suits their circumstances/preferences and can switch from one mode to the other, as their needs dictate. **Students attending class via Zoom are required to have their camera on and be ready for full participation in class discussions.**¹ Zoom-students should use the “raise hand” function to indicate their desire to speak to the class or ask a question and should mute their microphone until they are ready to speak. All class sessions will be recorded and posted on the course Canvas site. The Zoom link for class is: <https://utah.zoom.us/j/95460568036>.

Attendance Expectation: “The University expects regular attendance at all class meetings” (Policy 6-100.III.O). So do I. Most of you are taking this course as part of a degree program in professional planning or real estate development. I therefore urge you to treat yourself—and your peers and instructors—as professionals. Professionals show up where and when they are expected. Consider this class as part of your job.

Location: This class will be held on land once inhabited by Shoshone, Paiute, Goshute, and Ute peoples. At the time of annexation to the United States in 1848, after the Mexican-American War, the land was claimed as the territory of the Northwestern Shoshone people. Though covered by an 1863 treaty between the Northwestern Shoshone and the United States, the United States treated the land as public domain, refusing to recognize claims that it was subject to aboriginal title. *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335 (1945).

Instructor: Keith Bartholomew, J.D. – Professor of City & Metropolitan Planning; former Associate Director of the Wallace Stegner Center for Land, Resources and the Environment at the S.J. Quinney College of Law; former staff attorney for 1000 Friends of Oregon, one of the nation’s leading growth management advocacy organizations (see <http://www.friends.org>).

Office Hours: My office hours are 5:00 to 6:00 on Tuesdays and Thursdays, right after class, and 2:00 to 4:00 on Mondays, Wednesdays, and Fridays (beginning January 13). The T/Th times are drop-in hours (no appointment necessary). For M/W/F times, please use this Google Sheet to sign up for an appointment: https://docs.google.com/spreadsheets/d/1ITf9SW62XgMKpCYaDSOHIJ_4RMowaw17/edit?usp=sharing&ouid=108705416513245135382&rtfpof=true&sd=true. Note that appointments

¹ If you would like to have a virtual background for Zoom, here are some instructions on how to create one: <https://support.zoom.us/hc/en-us/articles/210707503-Changing-your-Virtual-Background-image>

may be in person or on Zoom (use the link on the Google Sheet). Please note that masks are required for in-person appointments.

Introduction: The subject of urban planning in the U.S. can hardly be broached without directly incorporating some aspect of the American legal system. Our methods and processes for planning in cities and towns are not just about (hopefully) good ideas, but also about how those ideas become expressed in public policies that can be implemented. Whether those policies are substantive or procedural, distributive or regulatory, their implementation almost invariably involves some expression of what we commonly call “the law” (Anderson 2003).

At its core, **the term *law* refers to the principles and norms of a community, as articulated by an authoritative source, that regulate behavior, the compliance with which is ensured by binding sanctions** (Random House 1987). Thus, the laws that govern our society include many expressions of policy beyond the statutes passed by legislative bodies, such as Congress or state legislatures. Also included are the federal and state constitutions, the regulations adopted by administrative agencies (e.g., EPA and DEQ), the orders issued by courts, and the ordinances and permit decisions adopted by local governments. This course will explore all of these types of law, as they are expressed in the modern practices of planning and real estate development.

Teaching Approach: I teach this course using materials and techniques common in American law schools. The primary text for the course will be a collected series of excerpted judicial opinions issued by courts from around the country. The process of reading and learning from judicial opinions is different from other, more typical course texts. Whereas the typical text book will provide the principles important to a subject in a more or less organized and pre-digested fashion, judicial opinions provide real life examples that exemplify the important principles, which are often times embedded below the surface of the case’s narrative. Most judicial opinions contain a great deal of fact-specific information that is important to understanding the background and context of the dispute in question, but the essential, over-arching legal principles that students need to extract and classify will likely be scattered throughout the text, frequently intertwined with other material. **It is your job as the reader to identify these more universal principles, decide which are important to your inquiry, and then organize them into an overall framework (usually in the form of a detailed course outline).**

In a similar fashion, class sessions will utilize a style of teaching known as the Socratic Method. Instead of delivering lectures in which the important themes are presented in ready made fashion, an instructor using Socratic Method asks questions of the students. The resulting answers help the class derive the principles that are important to the course. Though myths surrounding Socratic Method suggest that it is a type of sadistic hazing ritual (see Paper Chase: <https://youtu.be/qx22TyCge7w>), we do not follow that format in this class! This video description of Socratic Method is closer to what I aim to achieve in our class: <https://youtu.be/yIbV1nzOqgM> Think of Socratic Method as having a conversation about a topic.

Course Learning Objectives: Through this course, students will:

1. Obtain a comprehensive understanding of:
 - The common law and constitutional bases of modern planning and real estate development law;
 - The basic mechanics of how land use law is expressed in judicial opinions, statutes, administrative regulations, and zoning and subdivision ordinances; and
 - How the various types of planning law manifest themselves in local entitlement (permitting) processes and decisions;
2. Master skills of inquiry and learning necessary to:
 - Read and understand judicial opinions, administrative regulations, statutory law, and local government ordinances;
 - Extract important concepts from large volumes of information;
 - Assemble those concepts into larger constructs and systems;
 - Apply those systems in a variety of experience-based contexts and situations; and
 - Express understanding of the systems and their constituent concepts verbally and in writing.
3. Gain knowledge in how the law is expressed and implemented in the following subject areas:
 - Zoning and subdivision control;
 - Rights and duties of property ownership;
 - Permitting and development entitlement procedures; and
 - Utah zoning and planning statutes.

Required Texts: The required texts for this course are all on, or accessed through, the course Canvas page (and free!):

- A collection of excerpted judicial opinions.
- Utah Land Use, Development, and Management Act (LUDMA)
- Salt Lake City Master Plans and Zoning and Subdivision Ordinances
- Other readings, as assigned.

Optional Texts: For those interested in reading more, here are several books I can recommend:

- Craig Call, *Ground Rules: Your Handbook to Utah Land Use Regulation*, <https://utahlanduse.org/product/ground-rules-your-handbook-to-utah-land-use-regulation/>
- Nolan & Salkin, *Land Use Law in a Nutshell* (any edition)

Schedule:**Module 1: Intro to Course, Law, Practice of Law, and Property**

- Jan 10: Video introduction to the course.
- Jan 12: Care, *The City Planner and the Unauthorized Practice of Law*
Utah Land Use, Development, and Management Act
(LUDMA) secs. 10-9a-301 to 305

In this module, students will:

- Develop a multi-step definition of “law” that distinguishes the term from other, related terms such as “policy” and “guidelines.”
- Understand how to pull concepts apart into their component elements
- Start creating an outline for the course
- Comprehend what the “practice of law” is and how to identify activities that constitute the practice of law (for the purpose of understanding when one needs a licensed attorney)
- Introduce LUDMA as the primary source of local government authority to plan, zone, and permit.
- Use LUDMA to understand broader concepts of governmental power—who has it, where does it come from, how is it delegated?

Module 2: Common Law Foundations – Nuisance, Covenants & Easements

- Jan 17 & 19: *Clark v. Wambold*
Bove v. Donner-Hanna Coke
Neponsit Property Owners v. Emigrant Industrial Savings
West Alameda Heights HOA v. Jefferson County
Utility Easement Example
M.N.V. Holdings v. 200 South

In this module, students will:

- Identify the common law roots for current understandings of property rights and limitations
- Define the component elements of the following common law concepts
 - Nuisance
 - Restrictive covenants
 - Easements (both expressed and implied)

Module 3: Land Use Plans & the Planning Process

Jan 24 & 26: *Bone v. Lewiston*
Infinity Consulting v. Huntington
Baker v. Milwaukie
 LUDMA 10-9a-102, 401 to 408
 SLC, The Westside Master Plan
 How to Write an "A" Exam

In this module, students will:

- Understand what general plans are/are not, what they do, how they are created, and what their minimum requirements are
- Identify and define "substantive due process" as the primary constitutional basis for, and limitation on, governmental authority in planning, zoning, and permitting
- Learn how to deconstruct and analyze a story-based exam question

Module 4: Basics of Zoning

Due Jan 31: Written response to practice exam question
 Jan 31 & Feb 2: *Hadacheck v. Sebastian*
Euclid v. Ambler
 Zoning Ordinance Template
Chicago Heights v. Living Word Outreach Full Gospel
Larsen v. Pittsburgh
Morehouse v. Hunt
Parks v. Killeen
 LUDMA 10-9a-501 to 503, 505, 507, 511
 Salt Lake City Zoning Ordinance (City Code: Title 21A)
 Salt Lake City Zoning Map

In this module, students will:

- Understand what zoning ordinances are/are not, what they do, how they are created, and what their minimum requirements are
- Learn basic zoning concepts, including:
 - Conditional use permitting
 - Variances
 - Non-conforming uses
 - Accessory uses
- Gain experience reading and navigating through a zoning ordinance

Module 5: Subdivision Control, Vested Rights & Impact Fees

Feb 7 & 9: LUDMA 10-9a-509, 601 to 611
 Salt Lake City Subdivision Ordinance (City Code: Title 20)
Dawe v. Scottsdale
Avco Community Developers v. So. Coast Regional Comm'n
Banberry v. South Jordan
 Utah Code 11-36a (Impact Fees)
 Salt Lake City & Park City Impact Fee Schedules
 Student responses to practice exam question

In this module, students will:

- Define what subdivision ordinances are/are not, what they do, how they are created, and what their minimum requirements are
- Understand what “vested rights” status means and what is required to achieve it
- Identify what is required for governments legally to require the following as conditions for land use approval:
 - Onsite improvements
 - Offsite improvements
 - Impact fees
- Learn how to deconstruct and analyze a story-based exam question

Module 6: Eminent Domain, Regulatory Takings & Exactions

Feb 14 & 16: *Kelo v. New London*
Pennsylvania Coal v. Mahon
Lucas v. South Carolina Coastal Comm'n
Penn Central v. New York
Nollan v. California Coastal Comm'n
Dolan v. Tigard
 LUDMA 10-9a-508

In this module, students will:

- Define “eminent domain” (aka “taking”) as a basic governmental power
- Identify the following constitutional limits on governmental use of eminent domain power:
 - Reasonable compensation
 - Public purpose for the taking
- Understand the concept of “regulatory taking”
- Define the constitutional requirements for making regulatory taking claims in the following circumstances:
 - Total takings
 - Partial takings
 - Exactions (of both property rights and fees)

Module 7: Procedural Due Process – Permitting & Entitlement

Feb 21 & 23: *Fasano v. Washington County*
Baker v. Carlson
McElhaney v. City of Moab
 LUDMA 10-9a-701 to 708
 Salt Lake City Zoning Ordinance Chapter 21A.06
 Salt Lake City planning staff report & decision
 Salt Lake City Planning Commission hearing & decision

In this module, students will:

- Understand how to distinguish between legislative, administrative/quasi-judicial, and ministerial actions
- For each of these types of actions, identify the procedures required by:
 - The US Constitution
 - LUDMA
 - The Salt Lake City Zoning Ordinance

Module 8: Review & Mid-term

Feb 28: Review
 Mar 2: Mid-term Exam

In this module, students will:

- Complete their outlines of the key concepts from 1st half of the semester
- Gain practice articulating those concepts succinctly and applying them to unfamiliar contexts and fact patterns
- Demonstrate their comprehension of the key concepts
- Refine their understanding of those concepts through exam feedback

Spring Break: March 6–12—No Class

Module 9: Housing Discrimination

Mar 14 & 16: *Buchanan v. Warley*
Shelley v. Kraemer
Ave. 6E Investors v. Yuma
Episcopal Church v. West Valley City
Martin v. City of Boise

In this module, students will:

- Understand how various land use controls have been used to advance overt racism and bigotry and how those measures have been challenged on constitutional grounds
- Trace how land use controls are still being used to advance racism and bigotry through indirect means and how Congress has sought to curb such practices

Module 10: Housing Affordability

Mar 21 & 23: *Home Builders Ass'n v. Napa*
 Wasatch County & Park City inclusive zoning ordinances
Anderson v. Provo
 Recent Salt Lake City housing ordinances
 LUDMA 10-9a-403, 408
 Oregon Middle Housing rules
 Affirmatively Furthering Fair Housing requirements (HUD)

In this module, students will:

- Survey some of the leading techniques being used to increase housing affordability through land use controls, including:
 - Inclusive zoning ordinances
 - Accessory dwelling units
 - Minimum density standards
 - Limiting governmental discretion during permitting
 - Eliminating exclusive single-family zoning
- Explore Utah and federal pro-housing planning initiatives

Module 11: 1st Amendment – Freedom of Expression & Religion

Mar 28 & 30: *Reed v. Gilbert*
 Salt Lake City Zoning Ordinance Chapter 21A.46
Thomas v. Chicago Park District
Pruneyard Shopping Center v. Robbins
Guru Nanak Sikh Society v. Sutter County

In this module, students will:

- Understand how the 1st Amendment to the US Constitution limits governmental authority to regulate signs, gatherings, and the construction of religious buildings

Module 12: Moratoria & Public Trust Resources

Apr 4 & 6: *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*
Gardner v. Wasatch County
 LUDMA 10-9a-504
Illinois Central v. Illinois
Just v. Marinette County

In this module, students will:

- Define constitutional limits on the use of government moratoria on land use permitting
- Learn about the public trust doctrine and consider implications it could have on the concept of property ownership

Module 13: Indian Law/Water Law

Apr 11 & 13: *Worcester v. Georgia*
 Brendale v. Confederated Tribes
 Irwin v. Phillips
 Arizona v. California

In this module, students will:

- Briefly survey the history of federal policy toward Native American tribes
- Outline the general concepts of tribal sovereignty and tribal land title
- Understand how state planning and zoning laws affect lands within tribal reservations
- Identify the general attributes of western water law
- Introduce the concept of federal reserved water rights

Module 14: Sustainable Development

Apr 18 & 20: *California Building Industry Ass'n v. San Joaquin Valley Air*
 Pollution Control Dist.
 Sample transit-oriented development ordinance & covenant
 CORE v. City of Coronado
 Cleveland National Forest Foundation v. San Diego County
 Oregon's Comprehensive Growth Management Program

In this module, students will:

- Explore the concept of marginal cost pricing for public services
- Examine sample Transit-Oriented Development zoning and deed restriction options
- Learn how zoning can be used to promote desired types of retail
- Consider options for protecting working farm and forest lands
- Compare Oregon's statewide planning and zoning system to the system in Utah

Module 15: Review & Final Exam

Apr 25: Review
 Monday, May 1, 3:30-5:30: Final Exam

In this module, students will:

- Complete their outlines of the key course concepts
- Gain further practice applying those concepts to a variety of unfamiliar contexts and fact patterns
- Demonstrate their comprehension of the key course concepts
- Refine their understanding of those concepts through exam feedback

Evaluation: I will base my assessment of your performance in the course on four sources:

- **Responding to Questions in Class** (10%): The planning and real estate development professions both require skill in oral communication and an ability to think logically when unexpected questions arise in professional contexts. This is why I track your response to questions I ask in class.

You gain points when you respond to my questions. The points are not for answering “correctly”; all you need to do to get points is to interact with me when I call on you. You can also lose points, however, by (a) failing to respond when I call upon you or (b) failing to have your camera on when attending class via Zoom.

Understanding that life happens, I provide each student with two free passes for the semester. Twice during the semester, if you do not wish to engage on a particular day, just say “pass” if I call on you; you will not be penalized for failing to respond that day. Talk with me if you need additional passes because of some emergent circumstance.

- **Exams: Practice** (10%) + **Mid-term** (30%) + **Final** (50%): Our professions also require the application of abstract concepts to particular sets of facts. This is why in the mid-term and final exams I ask you to articulate concisely the legal concepts we have studied **and** apply them to new factual situations that you have not seen previously.

To accomplish this, I will use short-paragraph and long-essay formats for both the mid-term and final exams. The mid-term will cover the materials studied in the first half of the semester. The final will be comprehensive. Both exams will be open book. They will, however, be timed; hence, robust advanced preparation will be essential.

To help you prepare for the mid-term, I will provide you with a short practice exam question in mid-January that you will respond to by January 31. The practice exam will give you a sense of how the mid-term and final exams are structured and an opportunity to hone your exam response skills. I will grade this practice exam pass/no-pass.

Before both the mid-term and final exams I will provide you with additional sample questions from prior years’ exams, which you can use for personal study and practice. We will discuss these sample questions during the review sessions in advance of each exam.

I will grade the mid-term and final exams using the traditional letter grades. I will also provide you with specific responses to your answers so that you may refine your knowledge of the concepts being tested.

I will administer all of the exams on Canvas; you will submit your responses through the Canvas Assignments tab.

Grades: Letter grades for the semester will be earned using the following scale: A ≥ 93.3%; A- ≥ 90.0%; B+ ≥ 86.6%; B ≥ 83.3%; B- ≥ 80.0%; C+ ≥ 76.6%; C ≥ 73.3%; C- ≥ 70.0%; D+ ≥ 66.6%; D ≥ 63.3%; D- ≥ 60.0%; E < 60.0%. I do not curve.

Note: There is a direct correlation between effort invested and grade received. Keeping up with the reading assignments, attending class, and actively participating in class discussions will significantly increase your odds of getting a good grade.

Important Dates: The last day to add or drop this class (without a “W”) is Jan 20; the last day to withdraw is March 3.

Universal Accessibility: The University of Utah seeks to provide equal access to its programs, services and activities for people with disabilities. If you will need accommodations in the class, reasonable prior notice needs to be given to the Center for Disability & Access, 162 Olpin Union Building, 581-5020 (V/TDD). CDA will work with you and the instructor to make arrangements for accommodations. All written information in this course can be made available in alternative format with prior notification to the Center for Disability & Access.

Campus Safety: The University of Utah values the safety of all campus community members. To report suspicious activity or to request a courtesy escort, call campus police at 801-585-COPS (801-585-2677). You will receive important emergency alerts and safety messages regarding campus safety via text message. For more information regarding safety and to view available training resources, including helpful videos, visit safeu.utah.edu.

Addressing Sexual Misconduct: Title IX of the federal Education Amendments of 1972 states, in part: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.” Under this law, violence and harassment based on sex and gender (which includes sexual orientation and gender identity/expression) is a civil rights offense subject to the same kinds of accountability and the same kinds of support applied to offenses against other protected categories such as race, national origin, color, religion, age, status as a person with a disability, veteran’s status or genetic information. If you or someone you know has been harassed or assaulted, you are encouraged to report it to the Title IX Coordinator in the Office of Equal Opportunity and Affirmative Action, 332 South 1400 East, Room 112 (Bldg. 73), 801-581-8365, or the Office of the Dean of Students, 270 Union Building, 801-581-7066. For support and confidential consultation, contact the Center for Student Wellness, 328 Student Services Building (SSB), 801-581-7779. To report to the police, contact the Department of Public Safety, 801-585-2677(COPS).

Canvas: This class makes use of Canvas for virtually all functions. You have “constructive notice” of any information posted on the course Canvas site or through the Canvas email system during the semester. That means I will assume you have received information posted on the site or sent out through Canvas email, and that you take responsibility for the consequences if you choose to not check the site or your Canvas inbox regularly. Please check your settings in the Profile portion of Canvas to make sure

they are calibrated to give you timely notification of activities on the Canvas site for the course: <https://utah.instructure.com/profile>.

Academic Misconduct: The course website includes a link to the university's Student Code, which contains the academic conduct standards expected of all University of Utah students. By the second class session I will assume that each of you has read the Code and is willing to abide by its requirements. MCMP students who engage in academic misconduct more than once are subject to the policy of the College of Architecture + Planning, which directs college and department administrators to seek the dismissal of offending students from their academic program.

Wellness: Personal concerns such as stress, anxiety, relationship difficulties, depression, cross-cultural differences, etc., can interfere with a student's ability to succeed and thrive. For helpful resources contact the Center for Student Wellness at <https://wellness.utah.edu/> or 801-581-7776. There are also helpful links on the Student Wellness Links page of the course Canvas website.

Preferred Names & Pronouns: The university provides me with a class roster that includes each student's legal name as well as their "preferred first name." If you have not set your preferred first name and wish to, go to <https://registrar.utah.edu/Chosenname.php>. You can also set your preferred name and pronouns in Zoom. I commit to do my best to refer to you with the preferred name and pronoun that you have indicated. If I get either of these wrong, please send me an email (through Canvas) to correct me.