I. Overview of City Planning
A. Comprehensive Plan—most states have some requirement that city prepare comprehensive plan based on goals and objectives based on extensive background studies and reviewed by community; long range land use goals for a given area based on policy concerns the planner deems important
   1. Elements—land use, demographics, housing, traffic circulation, community facilities, parks and recreation, infrastructure
   2. Land use element
      a. Existing land use analysis—see which parts of land are used for what development
      b. Factors affecting development—steep slopes, floodplains or floodways, cemeteries, infrastructures, noise contours
      c. Projected land use demand—usually great disparity between what is used and what is zoned for commercial activity
      d. Land use plan map
B. Zoning Ordinance—implements the land use plan by dividing the community into zones or districts
   1. Responsibilities
      a. Elected boards adopt zoning map and amendments
      b. Planner zoning administrator
      c. Board of adjustment performs judicial function
   2. Other types of regulations
      a. Subdivision regulations
      b. Sign ordinance
      c. Landscaping requirements and tree protection
      d. Wireless communication facilities
      e. Architectural review
      f. Lighting
   3. Development review—typically coordinated by city planner
      a. Things approved by planning commission—preliminary subdivision plats; site plans
      b. Things approved by elected body—final subdivision plats; rezoning

II. Introduction to Land Use Controls
A. Incremental decisions made by private individuals and groups
   1. Can plan and zone, but ultimately market makes the final decision
   2. Tension between market drive incremental decision and planning is at center of this course
B. Policy Issues
   1. Should issue—what ought to be, not what is; planning is about what should be
   2. Taxation—cities take into account revenue-raising when making land use decisions
   3. Utopia—link planning to some overarching intellectual principle of social organization
C. Economic side of land use—can always assume market option is preferable to legal option
   1. Efficiency theorem—most efficient allocation of resources is the best allocation; based on the assumptions of consumer sovereignty and willingness to pay
   2. Rule for conversion—land conversion must be efficient in the market to meet the market criterion; way to measure social benefit
3. **Efficiency**—greatest possible output for a given amount of input, so use that gets the highest price is the most efficient use; BUT—market doesn’t always work correctly
4. **Market failure**—market decision produces externalities that no one bargains for; EX—desire of people to maintain neighborhood
5. **Free rider problem**—if someone pays, all get the benefit even if they don’t pay
6. **Bribery**—if zoning decision is not the efficient solution, than those who will benefit from the efficient solution will try to change the zoning

D. **Coarse Theorem**—allow people to decide among themselves; no zoning and no one has the right to anything; let people bargain

E. **State and Regional Planning**—the wider you go in planning, the more difficult it is to develop a political base and get consensus
   1. **Civic model**—land use plans like those drawn at state level, but is state wide; good place for environmental concerns, etc.
   2. **Management model**—more coordination than land use
   3. **Areas of critical state concern**—environmental areas that if left to local concern would not be treated correctly; EX—wet lands, forest areas, agricultural areas

F. **Local Comprehensive Plan**
   1. **Standard Zoning Act and Standard Planning Act**—published in 1920s and now basic model for legislation in this field
   2. **Enabling legislation**—critical in the field; local government can’t carry out a function unless it has enabling legislation

III. **The Constitution and Land Use Controls**

A. **Nuisance Law**
   1. **Two types of nuisance**
      a. Public—nuisance affects public as a whole in some way
      b. Private—land use conflicts that usually arise between adjacent landowners
   2. **Per se v. Per accidens**—nuisance per se is one that is a nuisance no matter where it is; nuisance per accidens is the pig in the parlor
   3. **General rules**
      a. Nuisance law is really a balancing test—gravity of harm to $\pi$ v. utility of $\Delta s$ conduct
      b. Can’t enjoin a nuisance in advance—fact based
      c. Priority in time-use that gets there first wins
   4. **Case law**
      a. **Bove v. Danner-Hanna Coke Corp.**—[?] wants neighboring coke plan enjoined but [?] lost because foreseeable that area would be used for industrial development and plant was doing everything it could to avoid being a nuisance; court turns priority in time rule around by saying [?] should have known and balances the equities by measuring size, scope and importance of industry against single homeowner
      b. **Spurr case**—court says if you really want the injunction pay nuisance to move

B. **The Takings Issue**
   1. **General rules**
      a. **Notice rule**—ordinance is adopted before purchase, then on notice about use of land; if ordinance adopted after purchase, taking may still occur
      b. **Police power**—power to regulate for general health, safety and welfare
c. **Eminent domain**—taking of property for public purpose then just compensation must be paid

d. **Substantive due process**—14th A; applies to police power so that regulation must advance legitimate government interest

e. **Average reciprocity of advantage**—other benefits flowing to landowner compensate for restriction on land; everyone is restricted and benefited by comprehensive restrictive zoning ordinance

f. **Whole parcel rule**—takings law doesn’t divide parcel into discrete segments so must look at whole operation

2. **Takings clause**—nor shall private property be taken for public use without just compensation; see 5th and 14th A

3. **Case law**—dominated by a group of leading cases with own particular rule; no coalescence of principles yet

a. **Lake Tahoe Case**—Penn Central is the case that rules takings law

b. **Hadachek v. Sebastian**—brickyard that houses grew around had to move after city a single family/special use ordinance

c. **Pennsylvania Coal v. Mason**—first case to apply takings clause to regulatory program when no physical taking had occurred; court held there is a limit to how far regulations can go; if legislation goes too far to limit the value of property it can constitute a taking

d. **Village of Euclid v. Amber Realty Co.**—zoning ordinance prohibiting use of most of a parcel caused a 75 percent reduction in market value of land, but not unconstitutional because served a legitimate public interest

e. **Penn Central Transportation v. City of New York**—preservation law preventing use of air space over Grand Central station is upheld; 3 factors:
   i. Economic impact of regulation on owner
   ii. Character of governmental action
   iii. Extent to which regulation interferes with investment backed expectation

f. **Agins v. City of Tiburon**—municipality ordinance requiring density from 1-5 units and refuses to pay compensation; held that preservation of open space is a legitimate state interest; all economically viable use is destroyed then taking has occurred

g. **Keystone Bituminous Coal Ass’n v. De Benedictis**—purpose of law is prohibiting subsidence is to prevent paying damages, so no taking

h. **Loretto v. Teleprompter Manhattan CATV Corp**—established per se rule for takings; permanent physical occupation of building is a per se taking

i. **Nollan v. California Coastal Commission**—permit under state law to build new house involved an exaction; applies nexus test evaluating the relationship of the means taken to the objective trying to be achieved

h. **Lucas v. South Carolina Coastal Council**—taking has occurred when all economically beneficial use of land is denied; Penn Central isn’t overruled, this only applies when there is no economically viable use

i. **Palazzolo v. State of Rhode Island**—can’t make a rule that any successor in interest has notice if original owner had notice; O’Connor concurrence—follow Penn Central

4. **Exam Approach**—Three Supreme Court Tests

a. **Penn Central**—(no one follows this) economic impact, character of governmental action, investment backed expectation
   i. Partial taking—what if only substantial denial of all economically viable use or decrease in value?
ii. Investment backed expectations
iii. Notice

b. **Agins Two-Prong test**—advance a substantial, legitimate state interest or deny owner of all economically viable use

c. **Lucas per se test**—taking has occurred when all economically beneficial use of land is denied

C. State Takings Legislation
   1. Disclosure model—assessment and disclosure to public so they will know a taking is about to occur
   2. **Extreme substantive model**—adopts statutory requirement that if deprivation is certain percentage of property value, then taking has occurred

D. Federal Remedies for Constitutional Violations
   1. Big issue is whether to sue in federal or state court
   2. **Ripeness**—rule of federal jurisdiction that arises out of case and controversy requirement; deals with whether the decision is final
   3. **Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City**—can’t get into federal court until you have a ripe decision from local agency because takings claims are fact specific; administrative action must be final and pursue state remedy first if one is available
   a. **Agins**—have to make at least one application
   b. **Yolo County**—if turned down, may have to reapply, but not if reapplication is futile

E. Relief Under §1983 of the Federal Civil Rights Act
   1. Overview—remedy for substantive due process and equal protection violations; accepted practice for individuals to sue for taking claims under §1983 because provides a remedy in federal court for violations of the constitution; has to be constitutional violation before suit can be brought
   a. City is not automatically liable for conduct of employees in course of duty
   b. Single decision maker must be carrying out policy in some way to be held liable
   2. **Cloutier v. Town of Epping**—town refused to give a sewer hook up which he eventually got, but sued for damages occurred due to delays in getting permit; court held there was no violation of due process, just a dispute over the interpretation of law so defer to state court

F. Elements of Due Process/Equal Protection Actions
   1. Major §1983 Issues
      a. Custom or policy—have to show individual was a decision maker
      b. Immunity
      c. Justiciability/constitutionality concerns—can you really sue on a violation of state law?
   2. **Due Process Constitutional Barriers**
      a. Entitlement
      b. **Graham v. Connor** problem
      c. Ripeness (some circuits)
   3. **Equal Protection Constitutional Barriers**—as applied cases
      a. Ripeness (some circuits)
      b. **Graham v. Connor** problem—10th Circuit

IV. Control of Land Use By Zoning
A. Zoning Enabling Legislation—Standard Act format is format that is still behind all modern acts; makes zoning cases transferable from one jurisdiction to another
1. As of right—look at text of ordinance to know immediately what you could do with land
2. Writ of certiorari—at state level; appeal to the court about the record
3. Standard Zoning Format—three major categories: residential, commercial, industrial
   a. Residential zones differentiated by density
   b. Other zones differentiated by level of use
4. Typical zoning ordinance—goes beyond standard zoning act, but constitutional issues in area of signs and speech, definition of family, requirements for permits, etc.

B. Land Use Decision Process—when developer wants a change
1. Rezoning—plan commission first, then council; hearings at both levels; if no amendment, then can't appeal and must go to court
2. Variance or conditional use—board of zoning administration first, then council; if variance not granted, go to court and have statutory right of appeal
3. If rezoning is granted, 3rd parties can go to court to bring lawsuit against city

C. How a Zoning Case Gets to State Court—states decide cases as nuisance issues; look at purpose of restriction as applied and then look at economic impact of decision (applying both prongs of Agins)
   1. 222 East Chestnut Street Corp. v. Board of Appeals—3rd party sued because looked out apartment building window and saw parking lot; 3rd party so have to show special injury
   2. Ben Lomond Inc. v. Municipality of Anchorage—∏ got building permit and it was revoked, so claims due process violation; held that ∏ did not exhaust remedies when issues are non-constitutional and maybe when constitutional issues are presented to this court
   3. Copple v. City of Lincoln—∏ owns land where he wants to put up a shopping center and city zones land across town for shopping center; ∏ is not allowed to appeal legislative action so only remedy is a collateral attack such as an injunction
   4. City of Richmond v. Randall—∏ wanted to change from residential district to residential/office district; council rejected special use permit; held that court can't enter specific order mandating legislative body to rezone or grant special use permit because it invades legislative authority

D. Districting and Non-Conforming Use
1. Nonconforming use—zoning ordinance enacted where area is already developed and old buildings don’t conform to new ordinances
2. Case law
   a. George Washington University v. District of Columbia—GW wants special permit to building foggy bottoms; permit conditioned to limit number of students who can live off campus; substantive due process is not violated because keeping kids out of neighbors is a legitimate state interest
   b. City of Los Angeles v. Gage—storage of plumbing supplies and plumbing business was a nonconforming use after re-zoning occurred; held that passing of time does away with need to pay money for taking—amortization principle
   c. Krause v. City of Royal Oak—owner made unsuccessful applications for zoning change from multi to single family use, which were denied; application for injunction denied because apartments are not compatible with single family uses and that property could be used as zoned
Village of Belle Terre v. Boraas—court holds that regulation is not unconstitutional because residential areas should be a sanctuary for people.

E. Three Principle Federal Constitutional Challenges for Land Use Decisions
1. Takings clause—legitimacy of purpose and economic impact; no purpose for exactions
2. Substantive due process—legitimacy of purpose
3. Equal protection—legitimacy of classification and tiers of review

F. Locally Unwanted Land Uses
1. Definitions
   a. Accessory apartment—another unit in the dwelling or on the premises
      i. Problem—more density, more cars, parking problems
      ii. Sometimes employ a quota—certain % of houses in area can have them
      iii. Maybe put an age limit
   b. Manufactured housing—if mobile home meets federal standards, can’t keep them out, but can have appearance code or separate areas
   c. Large lot zoning—usually used to curtail development
2. Case law
   a. Johnson v. Town of Edgartown—3 acre lot zoning upheld because part of Martha’s Vineyard; not exclusionary because on an island, no demand for housing, and special state interest in the area
      i. Substantive due process case—challenger must prove by preponderance of evidence that zoning regulation is arbitrary and unreasonable, then municipality’s reliance on generalities won’t save the day and municipality must prove valid purpose

G. Incentive Zoning—mechanism for city getting what it wants; builder develops park in return for permission to disobey some zoning ordinance
1. Legal problems—inconsistent application; not really public open space, but private areas where speech is controlled; no Nollan nexus between building a park in return for extra height
2. Case law
   a. Ensign Bickford Realty Corp. v. City Council—developer had facility designed that met zoning, but zoning was changed and he was denied permit to rezone area so he could build shopping center back so brings action for writ of mandamus to make city reconsider; legislative act by City Council and court doesn’t look into legislative motive so control of competition purpose doesn’t matter because City advances another, legitimate purpose; aesthetic purpose is valid use of police power and zoning by its nature will depress value of some land at the expense of others

H. Uses Entitled to Special Protection
1. Free speech—adult use category, free speech law applies to substantive due process and equal protection; right to free speech is fundamental so get elevated standard of judicial review
   a. View point neutrality—EX—no churches that engage in animal worship are allowed in residential zones
   b. Content neutrality—regulation can’t be based upon content of subject matter
      i. If content based, government must show a compelling interest
      ii. If ordinance is content neutral, then can have time, place and matter regulation
   c. Case law
      i. Central Hudson—test for commercial free speech review: substantial government interest that is directly advanced no more than necessary
ii. City of Renton v. Playtime Theatres, Inc.—city outlaws adult movie theatres in certain areas; held that regulation is content neutral because purpose is to control secondary effects of theaters

2. Religious uses—some state courts say treat like everyone else, others say treat specially
   a. First Assembly of God of Naples v. Collier County—area where church was located was rezoned to a multifamily district that permitted community uses and churches; church built homeless shelter city said was in violation because not a customary accessory use; held that zoning didn’t burden religious practice and applied equally to all homeless shelters
   b. Religious Land Use and Institutionalized Persons Act—overruled Smith case; zoning regulation that places a substantial burden on a religious practice must be justified by a compelling interest that is the least restrictive means of furthering that interest
      i. If burden imposed as part of an individualized assessment, it violates the statute
      ii. Concerted effort all over US to get statute declared unconstitutional

I. Site Development Requirements
   1. Building envelope—all zoning ordnances have front, rear and side requirements as well as height requirements
   2. Floor area ration—if you use the whole site, can have two stories; use half the site can have four stories, etc.

J. Environmental Land Use Regulation—different from typical zoning ordinance because requires preservation of natural resources, restrains development, has federal or state presence, and relies on permit system with no plan and no comprehensive regulation
   a. Wetland, flood plain and hillside regulations are examples of overlay zoning
   b. §404 wetland permit program
      i. Applies to discharge of dredged or fill material
      ii. Have to have wetland area for statute to apply
      iii. Includes corps of engineer public interest review of permit applications
      iv. EPA also involved—authority to review permits for dredge and fill
   c. Floodplain district—within floodway, no uses allowed; outside floodway can build but need special permit
   d. Hillside zoning—probably ordinance would be an overlay district

V. Equity Issues in Land Use: “Exclusionary Zoning” and Fair Housing
   A. Exclusionary zoning—use of zoning ordinances by suburban municipalities to exclude housing that is affordable to lower income households; creates jobs-housing mismatch
   1. Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel II)—in I, used developing municipality doctrine to uphold regulation because realistic opportunity too low and moderate income housing was available on a regional basis; fair share doctrine implemented—mandatory use of inclusionary zoning
      i. Affirmative remedies necessary to undo past discrimination
      ii. State’s monopoly over control of land imposes obligation of fairness
      iii. Individuals have right to shelter that give hem a claim to public assistance
   2. Village of Arlington Heights v. MHDC—builder wanted to put multi-family housing right in middle of area zoned single family; distinguish from Krause because disparate impact (blacks earn less then whites so need housing more) and discriminatory intent (allowed discrimination to continue)
i. As long as one motivating factor is present and unconstitutional, regulation can be defeated
ii. Motivating factor proven here by legislative history and intent inferred from circumstances

3. **Larkin v. State of Michigan Department of Social Services**—ordinance applies only to group homes for the disabled; discriminatory treatment case because statutes that single out regulation for group homes for handicapped are facially discriminatory but doesn’t require discriminatory intent to invalidate statute; have to show that statutes are justified by individual safety concerns or really benefit rather than discriminate against the handicapped and are not based on unsupported stereotypes; court rejects because goal was deinstitutionalization and adult housing units close to another AFC facility isn’t related

**VI. The Zoning Process: Euclidean Zoning Gives Way to Flexible Zoning**

**A. Zoning Standards**

1. **Variances**—to authorize variances from the terms of the ordinance as will not be contrary to the public interest, where owing to special conditions, a literal enforcement of the ordinance will result in unnecessary hardship, so that the spirit of the ordinance shall be observed and substantial justice done; from Standard Zoning Act
   a. Used to change land or dimensional requirements
   b. Standard for variance is unnecessary hardship
   c. Courts say they should be sparingly granted

2. **Conditional Use/Special Exceptions**—the board shall find that the special exception will not be injurious to the public health, safety, morals or general welfare of the community; the board shall find that the special exception will be compatible and consistent with the character of the adjacent area
   a. EX: hospital in residential area
   b. Presumption in favor of granting
   c. Standards vary

**B. The Zoning Variance**

1. **Puritan Greenfield Improvement Ass’n v. Leo**—neighbors suit challenging decision by municipality that allows another use to come in; homeowner on fringe of business district wants use variance to convert home into dental office; hardship has to be unique to the owner, and here hardship was created by the surrounding area, which means ordinance should be amended and neighbors win; there is an element of economic impact to hardship
   a. **Self created hardship**—if I know lot is not zoned for my use and I buy it anyway
   b. **Notice**—duty to figure out zoning before you buy a parcel
   c. **Dimension and area variances**—some states apply standard of practical difficulty as well as unnecessary hardship

**D. Conditional Uses**

1. **Board of Supervisors of Fairfax County v. Southland Corp.**—city reg requires special use variance for quick service food stores under 5000 square feet and won’t approve 7-11; special exception upheld because city advances reason of opportunity to keep traffic away from busy intersections and decrease traffic problems

2. **Crooked Creek Conservation and Gun Club, Inc. v. Hamilton County North Board of Zoning Appeals**—gun shooting club wants conditional use overturned by court because appraisal evidence showed property value would go down; applicant has burden of showing entitlement and all board has to say is applicant didn’t make showing; standard for conditional use:
a. General welfare test—not injurious to public health, safety morals or general welfare of community
b. Nuisance test—not affect use and value of other property in the immediate area in a substantially adverse manner
c. Consistency—consistent with the character of the district

3. Merrillville case—board turned down application for storage facility because it would affect property value; no evidence but neighbors are afraid so higher court invalidates regulation

4. Washington State Dept. of Corrections v. City of Kennewick—can consider fears of neighbors in nuisance case, but not in a zoning case

E. The Zoning Amendment

1. Western Land Equities v. City of Logan—developer planned to build affordable housing project on land zoned for manufacturing and single-family developer but planning commission rejected protect after going on record saying the board is against single family zoning in the area; courts says regulation at time of application apply and then burden shifts to municipality to prove it has a compelling reason for the change
   a. Competing interests—property owner spent money on property zoned for what he wanted to do; public views developer wants as a nuisance once plans are out
   b. Majority rule—government must issue a building permit then landowner must rely on permit before estoppel can occur, but taking occurs if government tries to take away a vested right
   c. Balancing test—real burden on developer and public welfare interest isn’t that great, then find for developer
   d. Bright line test—regulation at time of application apply

2. Keuhne v. Town of East Hartford—neighbors challenging zoning; neighboring home owners were injured enough that they had standing; held that city can only rezone if it is in accordance with the comprehensive plan (substantial public interest in the rezoning)

3. Spot zoning—changing the zoning for only one landowner, who is asking for a use that is inconsistent with current zoning; not reason for an amendment; Keuhne thrown out because rezoning must be done in furtherance of general plan

4. Board of County Commissioner of Brevard County v. Snyder—court held re-zoning is quasi-judicial because not making of policy, but the application is policy; only one of two courts to adopt this position; how to determine if act is quasi-judicial? Number of people, size of land, etc.

5. Bottom line: if court treats rezoning as legislative, usually defer legislature

F. Procedural Due Process

1. Requires notice and hearing
2. State law—all have open meeting requirements
3. Federal law—apply procedural due process requirements only to administrative actions
   a. Applies only to an entitlement to a property interest
   b. Landowner has entitlement if: vested right and land use is permitted and time of application and agency doesn’t have the discretion to deny the permit or request for approval
   c. Balancing test to determine procedural due process violations: private interest affected by official action, risk of erroneous deprivation, governments interest

G. Down Zoning—usually for the benefit of the neighborhood or the community; suspect

H. Flexible Zoning Techniques—attempt to deal with compatibility problems on very small parcels of land
1. **Terry Town case**—deals with floating zone—text of ordinance is amended to include a new zone, but it’s not mapped until an application is made; legislative rather than administrative; gives municipality flexibility in dealing with new uses which must come in for approval

2. Contract zoning, conditional zoning, site review, etc. are outside of the statute 90 percent of the time

3. **Collard v. Incorporated Village of Flower Hill**—rezoning application and in order to be granted, municipality but conditions into covenant; court holds covenants must only be reasonable and consent is up to municipality
   a. **Contract zoning**—developer agrees to impose conditions then municipality agrees to change zoning; actual bargaining occurs
   b. **Conditional zoning**—attaching conditions to the land without any agreement; first developer writes then covenants with no guarantee municipality will rezone
   c. **Legal problem**—bargaining away of legislative power; can’t condition a legislative act; spot zoning that is not in accordance with comprehensive plan because only applies to one person

H. **Site Plan Review**

1. **Site plan**—covers site development, but not uses; attempt to deal with site development outside of the building envelope

2. **Charisma Holding Corp. v. Zoning Board of Appeals**—applied for an area variance; board moved site to middle lot; objected to move; variance upheld because there is an overlap between variance and site plan

I. **Role of Comprehensive Plan in Zoning Process**

1. **Mandatory**—statute says municipality must have a comprehensive plan

2. **Consistency**—zoning shall be in accordance with comprehensive plan; courts interpret this to mean plan isn’t required
   a. Arguments for requiring mandatory planning and consistency?
      i. Advances the decision on land use
      ii. Critical land use decisions occur at the planning stage and not at case by case development stage
      iii. Avoids ad hoc decisions being made at time of application

3. **Haines v. City of Phoenix**—zoning allows 250 ft buildings, but variances granted for 500 ft. buildings; court says they will use intermediate level scrutiny to look for consistency, but once they find it they will use rational basis review to evaluate the decision

4. **Holmgren case**—multi-family rezoning was consistent with plan that indicated single family zoning for the tract; depends on whether density or type of building is important to city

5. **Gillis case**—plan called for medium density residential development but rezoning allowed predominantly commercial development at same density

J. **Initiative and Referendum**

1. **Initiative**—voter initiated ordinance that is put on an election ballot

2. **Referendum**—electoral vote on an ordinance that has already been passed; still initiated by voters, but only legislative actions can be challenged in this way

3. **Township of Sparta v. Spillane**—two major changes in local ordinances in two communities; held that referendum is not allowed in zoning because don’t want to do away with valuable exertise of planning board or defeat purpose of comprehensive plan
VII. Controlling Residential Development

A. General info
1. Applies only when there is a subdivision of land
2. Began was a way to deal with conveyance avoiding title disputes
   a. File plat of land to describe boundaries of property
   b. Then divide it up into lots and blocks
   c. Convey it by reference to lots and blocks
3. Private covenants—covenant regime in new subdivisions are very comprehensive and can control a lot of issues that can’t be controlled by zoning ordinance
4. Majority rule—courts will not overturn decision by local board on covenants—will generally go along because covenants are privately imposed

B. Case Law
1. Garipay v. Town of Hanover—regulation said town planning boards could reject division of land to protect against scattered or premature subdivision or if division would involve danger or injury to health, safety or property; subdivision denied here because access road would be dangerous
2. Baker v. Planning board—city disapproves plan because land serving as a flood control are for the town; city’s reason for denying is that plan was against public interest and too expensive to fix drainage system to accommodate; held that beyond board’s authority to disapprove the plan

C. Dedications, Exactions and Impact Fees
1. Exaction—cost shifting process; costs of public improvements are shifted from public to private sector
2. Dedication
3. Impact fees—money collected to pay for facilities
4. Rohn v. City of Visalia—has to be some relationship between dedication of your property and the permit you are asking for; nexus test isn’t satisfied by planning policy; can’t use planning policy to justify an exaction if development doesn’t create the need for it

D. Dedications
1. Dolan v. City of Tigard—city wants walkway built by store in return for permit to build larger store and surface the parking area, which creates flood problems
   a. Can’t require landowner to give up a constitutional right in return for a benefit if there is no relationship between right and benefit
   c. Nexus test—exaction must be related to building project
   b. Rough proportionality test—there must be an individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development
   c. Court requires Nollan nexus and rough proportionality test be met
   d. Why dedications invalidated?
      i. Dedication of land does not in any way alleviate flooding danger; why require dedication of the land when the simple provision in ordinance that the land be kept free of development would be enough
      ii. City keeps landowner from exerting her right to exclude
      iii. Basically, back at Agins first prong
2. Sparks v. Douglas County—short plat application approved with condition that developers would dedicate rights of way for road improvements because streets at current width would accommodate future construction of street improvements
a. Proposed nexus between widening streets and increased traffic created by development, but rough proportionality problem is because need is based on future development
b. Road problems will be there whether subdivision is there or not, so really just an excuse for city to raise funds
c. Court doesn’t address future improvement problem because not enough connection

3. **Amoco Oil Co. v. Village of Schaumburg**—city looses because no evidence that dedication had relationship to impact of development; gas station’s property would have no effect on need to increase number of lanes for adjacent road ways

4. **Goss v. City of Little Rock**—rezoning to a commercial use district on the condition that landowner dedicate land for expansion of adjacent roadway; court held nexus test satisfied but rough proportionality test isn’t satisfied because idea that strip mall might be built some day without plans is too speculative

E. Impact Fees

1. **General info**—levied at the time of building permit and may not be levied by municipality; reasonable relationship test may be used in statute; often funds must be segregated

2. **Housing Office Linkage Fee**—idea that when you build an office you’re bringing more people into an area, so developer should pay fee to help build affordable housing

F. Planned United Developments and Planned Communities

1. Don’t really vary size of lot, but houses are clustered; different from subdivision because of common space owned by subdivision, neighborhood ass’n, etc.

2. Legislative approval should come first because legislative body has to decide policy issues from the concept plan; legislature should make land use and density decisions

3. **Problem**—discretionary decision making

3. **Case law**

a. **Cheney v. Village 2 at Mt. Hope, Inc.**—city adopted ordinance for PUD with all standards in it, then gave planning commission authority to approve the design’ no authority in standard act to authorize this procedure, but court has no problem finding implied authority

b. **Millbrae Ass’n for Residential Survival v. City of Millbrae**—city rezoned R1 to PUD district; after general plan approved, planning commission conditioned approval of precise plan on certain changes; held planning commission couldn’t condition approval of precise plan because changes were material or fundamental and therefore legislative so needed city council approval
   i. General plan—approved by legislature; includes densities, general lay out
   ii. Precise plan—approved by planning commission need more specific date on landscaping, architecture, etc.

VIII. **Growth Management**

A. **Classification of Growth Management Programs**

1. Phased growth—**Ramapo**
2. Rate of growth—**Petaluma**
3. Adequate public facilities ordinances and currency
4. Urban Growth boundaries
5. Tiers
6. Urban growth boundaries

B. **Problem addressed:** **Sprawl**
1. **Elements of sprawl**—low density, poorly planned, disconnected from other developments

2. Growth management adds following to traditional zoning
   a. No integration of provisions for public services and facilities in such a way that they would be available when development occurs
   b. Problem—effect of sprawl on the maintenance of the simple city; lack of balance between city and suburban area; cost; loss of environmentally sensitive land
   c. Zoning doesn’t deal with these problems

C. **Moratoria**
   1. **Reasons for adoptions moratoria**
      a. Looking to change overall planning and zoning; BUT—comprehensive plan should address these problems
      b. Public facilities can’t respond to growth; BUT—city should have planned for it unless explosion

2. **Not automatically a taking**—length of time might be a factor
   a. Prior to 1987, most courts upheld moratorium if for reasonable time, delay occurred was not a taking if it was reasonable
   b. **Interim development control**—sets a rule for development during the interim; you can go ahead if it won’t interfere with plan

D. **Phased Growth Programs**
   1. **Golden v. Ramapo Planning Board**—court basically applied first prong of Agins and Lucas no economically viable use test to uphold regulation with objective to phase growth in tune with services
      a. Need special permit to build residential development and point system determined whether you got permit
      b. No taking because its not permanent enough because limited to 18 years
      c. Land might increase in value and owner could always build a single family home

2. **Berenson**—can’t be exclusionary and must provide for multi-family housing

E. **Rate of Growth Programs**
   1. **Petaluma**—plan had point system and quota for new dwelling units; annual allocation of permits to build based on number of points each developer got for his or her project
      a. Problem—different requirements weren’t weighted; if you did a good job on services might not have to worry about architecture
      b. Notion of quotas have disappeared from growth management

F. **Adequate Public Facilities Ordinances and Concurrency**
   1. Focus on public facility availability
   2. Establish level of service standards
   3. Effect of program is to shift cost to developer
   4. **Rosenburg**—adequate and reasonable to give discretion to board; map manipulation could solve problems

G. **Urban Growth Boundaries**—draw a line in the sand and no development is allowed on the other side of the line
   1. **Benjifran Development Inc. v. Metropolitan Service District**—developers wanted to build industrial park and wanted to amend UGB to do it; service district got involved when it denied the amendment; there is no per se preemption of the UGB by the economic goal; you have to balance all the goals together

H. **Transit Oriented Program**—development side of growth management; overlay district with specified housing types, minimum density and limited automobiles
1. **Purpose**—get people out of their cars, create pedestrian friendly environment, create places where people can live and work
2. **Issue**—whether this really helps growth management

I. **Corridor Preservation/Corridor Management**
1. **Two settings**—rural setting with new highway; urban setting where widening streets
2. **Rule**—after map with corridor is adopted, can’t develop the areas according to the Urban Official Map
3. **Important**—mapping corridor allows you plan around it
4. **Legal problem**—takes—by keeping land free of development, value of land is depressed prior to acquisition
5. *Palm Beach Co. v. Wright*—corridor preservation was part of comprehensive plan which saves regulation; can’t determine what was a taking until development application submitted because there are options for landowner when map is to be applied; no freezing so county has a number of options that can mitigate the impact of the map

J. **Agricultural Preservation**
1. **Goals**—make sure we have enough farmland to feed ourselves and preserving open space
2. **Types of programs**—not integrated
   a. *Federal farmland preservation act*—full disclosure act
   b. *Agricultural districts and property tax relief laws*—at the state levels; lighten up property tax load so farmers can stay in business
   c. **Right to farm**—protects existing uses
   d. *Agricultural Zoning*—exclusive zoning so that only agricultural uses allowed or non-exclusive zoning so other uses with minimum lot size requirement are allowed
3. *Gardner v. NJ Pinelands Commission*—program to reduce encroachment on NJ farms by limiting residential development to maximum sizes held to serve a legitimate purpose because preserving agricultural nature of area, preserving food supply and contribute to special character of pinelands; no taking because viable, practical existing agricultural use
4. **Bottom line**: *Gardner* case had agricultural program supporting important conservation program, comprehensive plan so not a question of setting out a single farmer, existing use that is profitable, transfer of developments rights program to transfer value he’s lost some place else and no investment backed expectations

IX. **Aesthetics: Design and Advertising Controls and Historic Preservation**

A. **3 stages to judicial recognition of aesthetic regulation**
1. Aesthetics were never a basis for land use control
2. Aesthetics alone is not enough to justify a land use regulation but that it was sufficient if supported by other factors; CRITICISM: other facts derived from aesthetic impact
3. Aesthetics alone is accepted as a regulatory justification; See *State v. Miller* pg. 748
4. **BOTTOM LINE**: courts are expressing a value judgment; compare to nuisance law at beginning of course

B. **Sign Ordinances**
1. Two types of signs: wall signs and ground signs
   a. Ground sign provisions deal with height, spacing and size
   b. Wall sign provisions deal with size
2. *Metromedia, Inc. v. City of San Diego*(state case)—all off-site advertising billboards are banned, requires removal of existing billboards and on premise signs could display name of business only
a. Ordinance that eliminates billboards designed to be viewed from streets reasonably relates to traffic safety
b. State relies on scenery to attract tourists and commerce

C. Free Speech Issues
1. Central Hudson provides test/requirements for regulation of commercial speech (pg. 762)
   a. Effectively a presumption reversal
   b. A legitimate governmental interest must be advanced no more than necessary
   c. 3rd and 4th tests have become most important

2. Content v. viewpoint neutrality
   a. Regulation can’t be based on information contained in advertisement
   b. Sign ordinance regulates the message then there is a lack of viewpoint neutrality

3. Commercial v. non-commercial speech—can’t discriminate against commercial speech

4. Time, place and manner restriction—under police power, can regulate speech in this way as long as it is unrelated to content

5. Metromedia, Inc. v. City of San Diego (SC case) violation of 3rd prong of Central Hudson test; Allowed on site signs advertising goods, services on the premises, allowed government signs, commemorative plaques, etc., no non-commercial messages on site and off-site billboards banned
   a. Upheld ban on off site billboards because limited to commercial; usually need compelling interest for regulation of non-commercial speech
   b. Court accepts CA court’s aesthetic justification for removing billboards
   c. Can’t prohibit on premise non-commercial speech
      i. Fix the problem: write sign ordinance to say you can have commercial and non-commercial speech
      ii. Problem with defining terms: no longer content neutral
   d. Court held that the exemptions were a violation of free speech clause because they were not content neutral

6. Discovery Network—seems to say that distinctions between different kinds of commercial speech would also be subject to a stricter scrutiny

7. Some cases uphold prohibitions on non-commercial signs in special areas, like historic districts, where strong aesthetic reason justifies position

8. NOTE: Under Central Hudson tests, court reviews substantive due process issues as a free speech problem by deciding if regulation went no further than necessary; SC decided aesthetics was a proper basis for sign regulation as was traffic safety

C. Regulating Design
1. State ex rel. Stoyanoff v. Berkeley—dealing with similarity ordinance relying on existing environment as basis for aesthetic measurement; have to match existing environment; ordinance held constitutional because police power includes ability to promote general welfare and conserving property values is a proper purpose of zoning

D. Urban Design Review
1. Type of Programs
   a. By building type: residential, retail
   b. By Area: MXD, downtown, neighborhoods
   c. By project: PUD

2. Types of Standards
   a. Appearance codes: conformity or nonconformity
   b. Independent design standards: quantitative (articulation and façade requirements) or qualitative (integrate canopies in building design)
3. How Adopted
   a. Citywide design review code
   b. Subarea design plan
   c. Criteria in PUD and site plan review ordinance

4. How Applied
   a. Designed code or plan directly to: individual buildings (big box retail) or development projects (MXD)
   b. PUD and site plan ordinance review criteria—applied in review of design elements in site and PUD plans

E. Historic Preservation

1. General info—not dealing with vacant land anymore, but with treatment of existing buildings
   a. Usually an overlay and most important requirement is certificate of appropriateness requirement
   b. No building altered in any way that affects exterior features unless commission approves
   c. Separate procedure and separate review board
   d. Preservation is act of preserving integrity or historic character of exteriors

2. Figarsky v. Historic District Commission—denied certificate of appropriateness to demolish house in historical district where nothing was distinctive about building but was screening historic district off from adjacent commercial area; court upheld aesthetic purpose of ordinance because proper use of police power to create entire historic district and rely on economic benefits of tourism; rejects takings claim because by being forced to make repairs, [I] losing money, but no evidence that if made repairs property wouldn’t have some value to it

3. Average reciprocity of advantage rule—helpful in supporting constitutionality of historic districts, but not helpful for landmarks; WHY?
   a. In historic district, larger area and everyone bears burden
   b. Landmark is only one building and landowner bears the burden

4. Gamble-Skogmo—wanted to replace historic building in Santa Fe and required to limit size of windows; window size probably not related to preservation of single family district

5. Historic preservation is a talismanic term—once you use the phrase historic preservation courts are much more relaxed about what they will and will not accept in terms of regulation

6. Lafayette Park case (pg. 797)—held that destruction can occur because economic considerations cannot be wholly discounted; Other view: possible that dwellings value after rehabilitation will be more than their existing value plus the cost of repair if all dwellings in area are rehabilitated

7. Maher case (pg. 798)—court concluded that owner of historic building hadn’t made a case for a takings on the facts; similar to Figarski case from Conn

F. Historic Landmarks

1. Very few cases since Penn Central that really get to the takings problem and consider issue of demolition
   a. In Penn Central building being put to practicable use
   b. Didn’t want to tear it down but build on top
   c. Sustainable economically viable use convinced court to uphold city’s refusal

2. St. Bart’s (pg. 800)—doesn’t raise all issues raised by demolition requests; Why not?
   a. Church had a building that it didn’t like and wanted to tear it down
   b. Weren’t going to build another religious building
c. Maybe some kind of substantial burden for religious use that is similar to test under free exercise clause

G. Transfer of Development Rights

1. How it works—internalize the taking in the private market for compensation; under zoning ordinance owner of historic building has air space development rights, which are severed from property (sending area) and transferred to another site (receiving area) where the developer pays for rights and presumably can build more than his neighbors can
   a. Usually made available in specified area, but can pick any area they want to preserve as long as they’re fair in making that determination
   b. Problem—receiving area was zoned the way it was for some reason; TDR may frustrate purpose of comprehensive plan; if the existing zoning was correct, then why allow someone to do more
   c. Answer—in order to develop a market for the rights, you down zone the land; BUT—is that a violation of due process

2. Implementation of TDR Programs
   a. Adoption of TDR ordinance as overlay
   b. Designation of sending and receiving sites
      i. Development restrictions at sending site
      ii. Development restrictions and TDR options at receiving sites
   c. Voluntary or mandatory programs
   d. Automatic transfer or discretionary review
   e. TDR bank programs—Gardner case in the Pinelands; public agency buys development rights and then sells them; WHY? hard to figure out where the market is and who is participating

3. Types of TDR Programs
   a. Historic preservation and historic landmarks
   b. Preservation of agricultural and ecological areas
   c. Protection of open space and scenic views

4. Legal validity of TDR Programs
   a. Need for enabling legislation
   b. Development restriction and uniformity claims at the receiving site
   c. Taking claims at the sending site

5. Fred F. French Investing Co. v. City of New York—creation of the special park district that had to be open to the public; court recognizes that developmental rights are at least theoretically transferable; court found TDR program was to uncertain (no guarantee rights would ever be sold), double abstraction (yet to be sold and subject to future approvals) and combination of market and administrative uncertainty

6. How could you make French program more acceptable?
   a. Constitutionality of TDRs is still in doubt because of French case insofar as a possible takings might occur
   b. Nature of restriction at sending area is important, but will always be a rather severe restriction
   c. Problem is uncertainty in value—always market value uncertainty
   d. Successful programs have been narrowly conceived