



M10
Local Land Use Manual?

This semester, I am teaching Land Use, and in the casebook I came across this evocative and meaningful quote from [Tony Arnold](#):

The real law of land use regulation exists mostly in zoning codes and regulatory procedures, as well as in the actions or decisions of local land use regulatory bodies. Consider all the zoning, planning, and regulatory permitting decisions (e.g., conditional use permits, variances, subdivision maps or plats, site plans, planned unit developments, development agreements) that are made every week throughout the year, in comparison to the number of reported judicial opinions or even lawsuits that are resolved by the courts on the merits on land use issues in any given year. For example, **in 2000, in Anaheim (California) Planning Commission considered and made one or more decisions (in many cases multiple decisions) on 225 land use projects. In the same year, no reported judicial opinions addressed land use issues in Anaheim.**

Craig Anthony Arnold, *The Structure of the Land Use Regulatory System in the United States*, J. Land Use & Envtl. L. 441 (2007).

Now, obviously, judicial decisions at some level influence what is occurring in zoning boards and planning commissions. But there is a lot going on where the courts are just not involved. Where is “the law”? In the planning bureaucracy, the zoning boards, and planning commissions.

And in fact, it is somewhat more extreme than that, because in my experience, zoning boards and planning commissions feel no need to adhere to *stare decisis*.

The adjudicators aren't courts; they're administrators. Every circumstance is different, especially because it involves land (this is why you've always been able to get specific performance for land contracts: each piece of land is said to be unique).

What this means, then, is that a good chunk of local land use regulations resembles not traditional Anglo-American law but rather a civil law system prevalent in Asia, Latin America, and continental Europe — or at least the traditional image of that system. The template for American land use is not the United States Constitution but rather the Code Napoleon. Most importantly:

- 1) no *stare decisis*;
- 2) adjudicators who are administrators and bureaucrats rather than judges; and
- 3) rare intervention by outside courts.

One could say that all administrative law looks like this, but there is a difference of degree there so substantial that it resembles a difference-in-kind. Certainly for major federal agencies, intervention by Article III courts is common and a constant shadow over their work. This is hardly true for zoning boards. Moreover, federal administrative agencies often have rules following their own precedents, particularly in light of the *Chevron* doctrine, because federal courts will defer to their interpretations.

Obviously, there are significant differences, most notably the influence of local political factors in land use decisions. But if we are looking to understand local land use decisions, we might have broader, richer, and more interesting templates than we currently have used. It could be highly productive to study the administrative decision-making process in civil law countries as an analogy to local land use.

This study, of course, would require much field research in Paris and Rome....