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The Intersection of Environmental and Land Use Law: A Special Edition of the Pace Environmental Law Review, Including Commentaries and a Collection of Articles by Professor John R. Nolon*

Foreword

This special issue of the Pace Environmental Law Review collects and presents a body of work by Professor John R. Nolon. These articles explore the critical intersection between land use and environmental law and suggest a strategic path for reform of the land use and environmental regulatory system at the federal, state, and local level. This issue also features commentary by Linda A. Malone, David L. Callies, and A. Dan Tarlock on this important topic and on Professor Nolon's scholarship.

The first article, *In Praise of Parochialism: The Advent of Local Environmental Law*,¹ was published in 2002, precisely when federal efforts to control nonpoint source pollution were foundering. It describes a groundswell of local environmental laws and the adaptation of local land use law in response to perturbations in local environments, including nonpoint source pollution, as well as the disappearance of open space, threats to habitat, and a host of other environmental problems of interest to lawmakers at all levels of government.

*Golden and Its Emanations: The Surprising Origins of Smart Growth*² was written to commemorate the thirtieth anniversary of *Golden v. Ramapo*, a seminal case in the early 1970s that endorsed local attempts to manage growth comprehensively. These

* Professor of Law, Pace University School of Law, Counsel to the Land Use Law Center, Visiting Professor, Yale School of Forestry and Environmental Studies.

1. John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 363 (2002). © (2002) by the President and Fellows of Harvard College and the Harvard Environmental Law Review. When referencing this article, please use its original citation.

2. John R. Nolon, *Golden and Its Emanations: The Surprising Origins of Smart Growth*, 35 URB. LAW. 15 (2003).

were the early days of today's smart growth campaign, which encourages local efforts to accommodate development pressures while protecting the quality of life in the context of regional, state, and federal needs. This article was published in 2003, just as the smart growth movement crystallized. It demonstrates what localities can do to invent creative land use strategies when given legal authority to do so by their state legislatures. It also probes the irony of empowering localities to adopt growth management plans in the absence of larger-scale planning. In doing so, the article reflects on the need for greater integration of local, state, and federal influences on the land and its resources.

The third article, *Historical Overview of the American Land Use System*,³ was written in 2004 to explain this country's land use system and its relationship with sustainable development. It was first presented as a paper at an international symposium of environmental law scholars held in Nairobi, Kenya, which was sponsored by the Academy of International Environmental Law and the World Conservation Union (IUCN). The article describes the fragmentary nature of this system—the disconnects between local, state, and federal law—while searching for threads of coherence that demonstrate how the law can be better integrated. This analysis is designed to assist scholars in other countries to evaluate and, perhaps, improve their legal regimes.

The fourth article, *Comparative Land Use Law: Patterns of Sustainability*,⁴ written in 2005, extends this exploration of comparative land use law to laws adopted in countries from every continent. It examines nearly 100 federal, provincial, and local laws and tentatively describes and assesses the global trends in sustainable development lawmaking that are observable in this collection. The laws themselves are contained in a publication of Cambridge University Press entitled *Compendium of Land Use Law and Sustainable Development*.⁵ The trends discussed include an increased emphasis on municipal involvement in land planning and implementation; greater transparency and citizen participation; a marked increase in the number of constitutional provisions that support sustainable development; attempts to restructure

3. This article will appear as a chapter in the forthcoming Cambridge University Press publication, *COMPARATIVE LAND USE LAW AND GLOBAL SUSTAINABLE DEVELOPMENT* (forthcoming 2006).

4. John R. Nolon, *Comparative Land Use Law: Patterns of Sustainability* 37 URB. LAW. 807 (2005).

5. *COMPENDIUM OF LAND USE LAW AND SUSTAINABLE DEVELOPMENT* (John R. Nolon, ed., Cambridge University Press 2006).

governmental systems to coordinate the activities of various levels of government; efforts to control, improve, and manage human settlements (including the provision of decent housing); greater protection and clearer definitions of private property rights; and initiatives to integrate land planning with a number of social issues including the reduction of poverty.

*Champions of Change: Reinventing Democracy Through Land Use Law*⁶ begins a three-part series of articles, all published in 2006, that explore how change occurs in legal systems and how legal influences on the land and natural resources can be reordered to achieve more coherence and better results. *Champions of Change* explains how, as municipal governments react to pressures and crises at the local level, they discover and adopt new strategies in a constant process of experimentation. Through a properly constructed legal framework, critical information can be relayed from local to higher levels of government, state, and federal legislators and judges can respond, and a “system” of law can evolve. Using theories developed in the fields of systems analysis and diffusion of innovations, the article describes the process by which local communities perceive land use challenges at the grassroots level and react through the adoption of responsive laws. It argues that state and federal governments, by being attentive to local innovations, can hasten needed change and create a coordinated and efficient system of land use law. The article presents and analyzes case studies at the federal, state, and local level that illustrate how law reform occurs and that demonstrate the interdependence of all the components within the system. The article explains the interplay of bottom-up and top-down forces and the importance of developing a legal framework for ordering the roles, resources, and competencies of each level of government involved.

The second article in this series, *Disaster Mitigation Through Land Use Strategies*,⁷ demonstrates vividly the high costs of uncoordinated federal, state, and local decision-making in the field of natural-disaster planning, response, and recovery. The article shows how the development of disaster-resilient communities and

6. John R. Nolon, *Champions of Change: Reinventing Democracy Through Land Law Reform*, 30 HARV. ENVTL. L. REV. 1 (2006). © (2006) by the President and Fellows of Harvard College and the Harvard Environmental Law Review. When referencing this article, please use its original citation.

7. This article is excerpted from *Losing Ground: A Nation on Edge*, by John R. Nolon, which will be published by Environmental Law Institute in Fall 2006. Reprinted with permission. © 2006 Environmental Law Institute.

rebuilding after disasters strike require local competency and intergovernmental coordination regarding land use and environmental planning and implementation. The Coastal Zone Management Act of 1972 and the Disaster Mitigation Act of 2000 demonstrate how a vertically and horizontally linked framework law can be constructed to encourage effective land development and conservation in disaster-prone areas and to deal with a number of other environmental problems. These legal linkages, however accidental in their creation, illustrate a new vision of an integrated system of law that can intentionally guide law reform at the federal, state, and local level.

The third article in this series—and the seventh in this special issue—is *Katrina's Lament: Reconstructing Federalism*. It begins with the cathartic exposure of the prevalent dysfunctions in the nation's legal system in the immediate aftermath of Hurricane Katrina. It describes, illustrates, and argues for a system of "reflexive law" implemented through an integrated framework of statutes and regulations at the federal, state, and local levels that allows regulators and private actors to influence and order the regulatory system. The article demonstrates how the regime set in place by the Clean Water Act to control stormwater pollution can be implemented so that federal, state, and local actions are carefully coordinated, without the redundancy that perturbs landowners and developers and that fuels property rights complaints, litigation, and legislation. Tracing the regulatory thread in the field of stormwater regulation from its source in the Clean Water Act through its actual implementation at the state and local level in one state, the article makes the case that regulatory programs can be designed to meet national, state, and local interests and take full advantage of the competencies of each level of government. Reflexive law regimes, in addition to integrating the influences of multiple levels of government, involve the private actors who are affected by governmental regulation. In the administration of the New York State Stormwater Management Program, this is accomplished through reliance on municipal implementation. By emphasizing the adoption of a local law, the New York program incorporates the entire apparatus of local land use law decision-making—and all concerned stakeholders—in the administration of a federal environmental law program.

All of these articles are collected in this special issue of the *Pace Environmental Law Review*. Presented as a unified body, they provide a comprehensive view of the issues involved at the

intersection of environmental law and land use. More importantly, they offer suggestions for making use of these fundamentally interconnected fields of law to create a more sustainable society.

The Editors and Staff of the Pace Environmental Law Review