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COMMENTARIES

Navigating the Confluence Among Real Estate, Land Use, and Environmental Law

LEE PADDOCK*

One of the most striking facets of the evolution of environmental law is that it has at the same time become both more international and more local. For much of the last thirty-five years, Congress and the U.S. Environmental Protection Agency have been the center of gravity for environmental law in the United States. However, beginning in the 1990s this began to change. Globalization of trade and the rapid emergence of worldwide pollution problems such as ozone depletion, destruction of terrestrial and marine habitats, and climate change drove increased attention to international environmental law.

Far less noticed, however, has been a critical counter trend—the growing importance of local environmental law. Federal environmental law was not designed to, and can not easily deal with problems such as urban sprawl, agricultural land preservation, habitat protection, mitigation of the impacts of natural disasters, and non-point source water pollution. These problems are inherently local in nature, and therefore require uniquely local solutions.

Unlike the historical focus of environmental law in the United States on large industrial facilities where technical solutions implemented by staff environmental experts could resolve problems, these local issues often involve small companies, enterprises such

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as farming that have not been closely regulated or individual behavior that is not as amenable to traditional regulatory solutions. Instead, more imaginative solutions that take advantage of the expertise and the management tools available at the local level exercised in the context of state and national legal frameworks are needed to achieve more sustainable development at the local level. These solutions require new means of navigating the confluence among real estate, land use, and environmental law.

Sustainable solutions to the growing conflicts surrounding development and environment at the local level can not be dictated solely through regulatory prescription. Instead, we will have to rely more on an integrated set of approaches that motivate better environmental behavior using regulatory mechanisms (both traditional tools such as permitting and enforcement and more innovative approaches), but that also rely on economic stimuli (development related taxes and subsidies, community acceptance, consumer demand, transportation costs, livability), and individual and organizational values to drive desired outcomes.

Increasingly lawyers who practice land use law, real estate law, international commercial law, trade law, energy law, corporate law and other fields should have a good working knowledge of environmental law to best serve their clients. And environmental lawyers, whether they work for NGOs, the government, or in the private sector, should understand how economics and values impact environmental behavior just as well as they understand the regulatory system and the environmental results it can produce. In other words, environmental decision-making will become increasingly imbedded in business decisions, land use decisions, and real estate decisions. This is a very positive development—in many ways it embodies what many had hoped the environmental impact statement process would do by “helping” decision-makers take environmental issues into account in making their “business” decisions.

This collection of articles by Professor John Nolon is an important exploration of one aspect of the increasing intersections between environmental law and commercial law—the growing importance of local environmental law and the emerging intersections among land use, real estate, and environmental law. It provides the reader with new ways of thinking about how the interest of developers, local government officials, community organizations and concerned citizens can be accommodated in pursuit of sustainable development.