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Symposium of the Advent of Local Environmental Law

Panel 1: Thursday April 18, 2002, 4-6 p.m.

Vicki Been, Linda Malone, Philip Weinberg

Vicki Been

My paper discusses the way developments on the international front may affect the division of power over environmental and land use regulation among federal, state, and local governments in the United States. When NAFTA was being negotiated, there was a lot of concern expressed about how NAFTA might affect environmental protection and, to a lesser extent, land use. But the focus in those discussions was not on investor protections, which have now surfaced as the greatest threat the international agreements may pose to environmental protection. Most people thought that the "takings" clause of NAFTA mirrored customary international law. International law standards hold that if there is a taking by eminent domain, compensation is required.

The investor protection provisions of NAFTA, however, provides that governments must pay compensation for acts that expropriate or are tantamount to expropriation.

NAFTA arbitration panels have held that, under that clause, state and local government's environmental and land use regulations may amount to an expropriation requiring compensation.

These holdings have sent shock waves through the environmental and land use communities because no one anticipated that the NAFTA investor protection provisions might be used to expand Fifth Amendment protections. The holdings allow Canada and Mexico to be faced with regulatory takings claims even though their constitutions reject such property protections. In the United States, the holdings allow foreign investors to challenge regulations as takings even when the Fifth Amendment would not require compensation.

My paper explores how national or federal governments could pass the costs of takings compensation required by NAFTA on to the local and state governments. I predict that if we get more arbitral panels requiring compensation for environmental and land

use regulations, there will be an effort by domestic property owners to expand the Fifth Amendment to match the property rights protections NAFTA affords foreign investors.

The implication of these new decisions goes beyond the monetary liability that state and local governments may face, however. The decisions also may cause the federal government to rethink the allocation of power over environmental and land use regulation in this country. The land use and environmental communities need to rethink their stances on free trade agreements to account for the threat investor protections in those agreements poses to the allocation of power over land use and environmental protection.

Right now, local governments are exercising more control over environmental threats, but if investor protections continue to be interpreted broadly, local governments may be unable to afford to impose local environmental laws. Local government decisions are most susceptible to threats of litigation under NAFTA and most susceptible to the chilling effect the threat of litigation may pose. To take advantage of the leverage the threat of litigation gives property owners, corporations will structure themselves to have a small foreign component that will allow access to NAFTA arbitration panels, and will allow developers to make an end run around the ripeness and exhaustion requirements domestic courts have imposed in takings cases.

My paper ends with a call for policy-makers to consider more carefully the effects investor protections in free trade agreements may have on the division of responsibility for environmental and land use regulation among federal, state, and local governments.

Comments:

Malone: A brief comment. I know that Earth Justice and a few other environmental organizations are watching Free Trade Area of the Americas (FTAA) agreement issues very carefully. I'm just wondering how much they've tried to monitor how both their organizations and others are going to find their interests threatened by investor protection agreements.

Been: It's been very interesting to watch the political dynamics of this. The very first takings claims that were brought under the investor protection clause were brought against Canada. Canada got a little upset about the whole thing and went back to the United States and Mexico and said "this isn't what we meant

here, let's all three issue an interpretive document saying this isn't what we had in mind." Mexico said, "we're getting a lot of foreign investment and trade as a result of this agreement, so we don't want to tinker with it." The United States said "these are our corporations that are getting the takings judgments, so we don't want to tinker with NAFTA." Then Mexico was ordered to pay compensation of seventeen million dollars in the *Metalclad* award. Suddenly Mexico became a fan of Canada's proposal. Then California was served with the notice of a one billion dollar takings claim by Methanex Corporation, and suddenly the United States started to pay attention to the threat the arbitral panels posed.

But the truth is, I don't think many local governments or even many state governments are aware of NAFTA's potential impact. California is now quite aware of it. Indeed, the California legislature has sent a message to Congress: "get us out of this mess in a hurry." So some states are starting to wake up, but I just don't think this is in the consciousness of very many people or many local governments. I know that environmental organizations and groups like Public Citizen now are working very hard to educate people, and to make the trade negotiators think this through, but part of the impetus of this project was that I wasn't sure that many land use and environmental law scholars, policy-makers, and practitioners even knew about the arbitral decisions.

Cohen: You might want to explore the differences between the ability of the federal government through treaties to bind provinces and states. In Canada, I don't think a treaty can bind the provinces because provinces are much freer to act in ways that interfere with corporate activities without liability under NAFTA. The feds would not be liable under NAFTA because they didn't do anything. If the province were held liable, though, I'm not sure the federal government can bind the provinces through a treaty.

Been: The feds are responsible if the province violates NAFTA.

Callies: Well, I'm not sure about Canada, because I am almost certain that they tried to get the provinces to ratify NAFTA for the precise reason that I think you might be wrong, and the provinces said "no, we aren't going to ratify it." I may be wrong on that, but there might be some differences in what happens in Mexico and the United States and Canada, and therefore you might find the impact on local government different across the three countries. It might be worth exploring.

Been: Each of the three nations have different federalism arrangements, different constraints on the federal government's ability to pass a judgment under NAFTA through to subsidiary governments, or to require a province or a state to regulate in a particular way. But under NAFTA, the three national governments that entered into this agreement are liable for the acts of their constituent parts. Whatever the federal government's relationship is with its constituent parts — Canadian law may say, for example, that the federal government can't pass the cost of liability under NAFTA on to the provinces — NAFTA says that the federal government has to pay for violations of NAFTA by its provinces. Now there are obviously differences between, perhaps Canada's ability to pass the costs of an award on to its provinces and the United States' ability to pass the costs on to a state. In Mexico, after the *Metalclad* judgment came down, the federal, provincial and local governments fought for a long time about who would pay. It is not entirely clear how they worked that out. One of the problems that any federal government trying to pass something back to the state and local governments is going to have is defining who is responsible for what. You have states implementing federal law; you've got local governments implementing state law. You've got people who will be able to say: "I denied the permit, but if I hadn't, the next level of government would have." So you've got a real mess sorting out which level of government is really at "fault."

McElfish: You talked about this in terms of NAFTA. I remember a few years ago a proposed multilateral agreement on investments had a worse, or even more liberal, provision in the draft version that reached impairment of value and things like this and that was put on hold. Are there any other things that your argument applies to that are already in existence under GATT or anything else? Is this a problem that goes beyond NAFTA in your view?

Been: I think it does go beyond NAFTA because although NAFTA has been said to be different because it includes language about actions "tantamount to expropriation," in truth the arbitral panels haven't relied on that phrase. They've said that "expropriation" can mean a regulatory effect on property rights, and under NAFTA, under the proposed MAI (Multilateral Agreement on Investment), and under many of the bilateral investment treaties that the United States has entered into, property is defined much more broadly than it would be in the United States. It's not at all

clear that decisions like *Metalclad* are limited just to agreements that have the “tantamount to expropriation” phrase in them. The United States has tried to export its takings doctrine as to what we would think of as physical takings – situations in which the government took title or physical possession of the property – by including compensation requirements in all of its investment treaties. Those requirements accordingly are in every agreement that the United States had entered into. So it just depends on how far the arbitral panels go in expanding the requirement to regulatory takings. It could reach pretty broadly.

Weinberg: I’ve been following *Metalclad* and its progeny too, at a greater distance than you, I guess, and am equally troubled by it. And I’m amazed and troubled also that there doesn’t seem to be any movement at all in Congress, in the federal government, by anybody in this country, and I wonder about Canada and Mexico, other than what you just mentioned, to get together and amend the treaty. Why do you suppose that is?

Been: Well, part of it is, as I hinted at, that there’s a fear by the signatory nations that if we start tinkering with NAFTA, the door will be opened to all kinds of changes – if we issue an interpretation on the expropriation clause, then other interest groups are going to demand interpretative agreements on other issues. The second fear is that once you even start talking about an interpretative statement, you run right into hard questions about how to draw a line between expropriations and regulations that significantly effect property values but shouldn’t be considered expropriations. The United States would probably like the compensation requirement to reach more than traditional physical takings, because the United States believes that there is such a thing as a regulatory taking. But drawing the line between regulatory takings and regulations that don’t trigger a compensation requirement is hard. We haven’t been able to solve that problem for many years, so why should the drafters of the interpretative doctrine be able to solve it? Those are some of the barriers.

There are representatives and senators who are tuned into this problem, because California has brought the problem to their attention. So, we may see more action in Congress. Certainly in the discussions and the debate over the proposed Free Trade Agreement, you’re starting to see Congress be a little bit more savvy about what investor protections could in fact mean when turned against domestic regulations.

Turner: Vicki, I just wanted to add that a couple of weeks ago Governor Davis extended the date for the cessation of the use of MBTE from December of this year to December of next year. He said it had nothing to do with this controversy, it's due to the search for an effective substitute.

Been: I didn't go into details about the cases, but *Methanex* is a great example of what I was saying about the investor protections being more threatening to land use than environmental law. One of the things that happened in *Methanex* is that Methanex's lawyers used Freedom of Information Act requests and other tools to produce evidence that Governor Davis, while he was campaigning, had met with some of the ethanol producers from the Midwestern states and had in fact received campaign contributions from those producers. Methanex therefore claims that Governor Davis is getting rid of MTBE not because of science, not because of its health threats, but because MTBE's competitors gave him campaign funds. Anyone who's worked very long in land use knows that once a court or arbitral panel starts looking at how the sausage is made, the government defendant has to worry that the rough and tumble of local government processes may not look very appetizing.

Cohen: Describe again your sense of the ability of the federal government to pass the costs of an arbitral panel's award on to either the state or local governments? I don't think you said that much about it, and I think that's actually quite important in terms of what may play out afterwards.

Been: The federal government could, in the United States (which is what I'm focused on, not Canada or Mexico), pass the costs back. Congress would have to pass a statute authorizing the federal government, whenever it is subject to liability for a NAFTA violation by a state, to offset grants that it is paying to the state by that amount of money, or to go into federal or state courts and sue the state for essentially indemnification for the liability. There's no 11th Amendment bar to the federal government suing the state government. So the only bar in terms of a pass through would be political. Members of Congress probably are not going to want to stand before their constituents and say "I passed a billion dollar judgment back to you, the taxpayers of California." So, there's definitely going to be a political constraint. My prediction is that Congress wouldn't do it through an outright pass-through. Instead they would say to California: "Your highway funding money

is dependant upon you not passing any regulations that trigger NAFTA liability,” or “Your highway funding is conditional upon your agreement to pay us back, to indemnify us, if we loose a NAFTA claim because of your regulations.” Or the federal government would use what we think of as conditional preemption, by saying “California, you are free to go for it, but if you start doing something that triggers NAFTA liability for us, we’re going to preempt that area of regulation.” In my paper, I work through the 11th Amendment, 10th Amendment, and other objections, but conclude that Congress could pass the awards back.

Joshua Dolger (student): Doesn’t there need to be some type of rational basis for conditional preemption, for the federal government to say that we’ll cut off funding to a state or local government for this and that? Doesn’t there need to be some type of connection between what you are trying to preempt? In other words, here it’s a suit for a billion dollars for cutting off an MTBE manufacturer – what’s the connection between that and the funding the government would seek to then take the liability award back out of?

Been: Yes, under *South Dakota v. Dole*, there has to be a rational nexus, although it’s a fairly low level requirement. But remember that *Dole* enabled the federal government to impose upon the state government regulations that the state didn’t otherwise want to have. It’s not clear whether the justices who wanted the nexus requirement in *South Dakota v. Dole* would think the same way about requiring the local or state governments to pay back, or indemnify the federal government for NAFTA liability. The pass-back would be like the federal government saying: “We usually give you X amount of money every year, but whenever you subject us to liability for doing what you have a perfect right to do because you’re a state, we’re going to offset our losses.” One could imagine Justice O’Connor insisting upon a rational nexus test in that situation, but one could also imagine her saying: “the federal government isn’t telling the state that it has to regulate, which is what our federalism decisions don’t allow; instead all the federal government is doing is asking to be indemnified for the choices that the state made.”

I’m speculating here, on several different levels. I could be completely wrong on whether or not there’s a problem – future arbitral panels could interpret NAFTA’s compensation requirement so that its effect is no different from the Fifth Amendment.

There aren't enough decisions yet to determine a trend. But I think the investor protections pose enough of a threat to environmental and land use regulation that we need to start thinking through what we want to say in debates about the proposed MAI or FTAA or expansions of GATT. We need to focus on how the investor protections actually will affect local and state land use and environmental protections.

Callies: Vicki, I think your paper raises a more fundamental problem than what we're talking about here. There are risks that we have not appreciated for decades in entering in agreements that are as detailed as this and potentially may affect land use controls. Europe is finding that out in spades. About two years ago the International Court for Human Rights in Strasburg rendered an opinion on a French law that had to do with combining certain interests in land for fox hunting. They decided that the individuals who were forced to surrender such rights, who were small farmers (and most were fox hunters, it turned out), had a takings claim under the treaty as a violation of their human rights. I had never before seen any international court equate human rights with property rights. If that grows, then we have quite a situation at hand.

Been: I agree. One could interpret the investor protections in even more threatening, even more expansive, ways. That is happening in various parts of the world, as you say, and I don't think we as environmental and land use academics and practitioners have been tuned in enough to what's been going on at the international level.

Linda Malone

Total Maximum Daily Loads are from Section 303, which began with a common sense notion that if there is a water body that is still impaired after technology based standards, there is a need for further controls to achieve the designated use. That was the last time common sense had anything to do with the TMDL program. Without the years of citizen suits, there would be no TMDL's today.

The July 2000 regulations devised a TMDL program for states to implement, which included nonpoint sources in the implementation plans, specific allocations and deadlines. The regulations were killed in a firestorm, as there was widespread Congressional disapproval, a controversial National Academy of

Sciences report and intense lobbying by major nonpoint source producers. Now the program is waiting for the Bush administration to do something.

What is happening with the newly proposed program? The name has changed from TMDL's to the Watershed Program with nonpoint sources only generally included in the allocations, yet there are no concrete deadlines, implementation plans or individual allocations to separate nonpoint sources. States must reasonably assure the EPA that the impairment will be remedied and the attainment attained. The only enforcement the federal government has is a five-year review of the plan to see if it meets the reasonable assurance requirement and then EPA can only withhold funds.

There are three basic truths: (1) Nonpoint source pollution is the single largest source of nonattainment and the problem is getting worse; (2) Agriculture, mining, and timber are major lobbying forces and they oppose mandatory regulations; and (3) Globalization has become a cliché, while insular fiefdoms of authority persist in federal, state and local governments. Over all of these truths, there is a myth: there is no federal land use law. Whenever this myth is cited, then it is a political manipulation.

So it ends up that voluntary planning hasn't worked in 30 years and will probably not work in the future. The proposed regulations emphasize the continued planning process in Section 303, but there has been a lot of time for planning with no results.

While there is nothing with concrete requirements in the new regulations, nonpoint source pollution problems may be addressed elsewhere. A possible solution is creative lawyering in citizen suits. The new regulations may not be concrete enough for a citizen suit, but there may be other federal regulations to use. Also, enforcement of preexisting consent decrees could be used.

There is no hope for state governments to do anything constructive because of a political stranglehold. If anything is going to happen, it's going to be at the local level. Also, entities like POTW's and point source discharges may eventually get fed up with compensating for lack of controls on nonpoint sources.

Comments:

Salkin: What would be the most effective federal land use policies, between the federal government exercising the power of the purse and they provide the funding? Except that for most of these programs, the funding goes to the states and the states don't give it

to local governments. And if the Local governments provide the greatest hope for the future and the John starts at the beginning and acknowledges that the local governments don't have the financial resources and technical wherewithal, which they could get if they had the money, how do we get the money to bypass the states in our federalist government.

Malone: One thing I would like to know, and I defer to people who are much more knowledgeable on the funding, is where the funding goes and how it gets directed. The specter that I see is that all of the money that is thrown toward this problem yet again going to the states to do paper plans, more paper plans, without any acknowledgement where this is going to be locally implemented and putting the money to implementation. At this point with only the reasonable assurance requirement, I'm afraid there will provisions that can be satisfied by simply pointing to other plans. John and others may be better situated to address how the money may be redirected.

Nolon: There are at least two dimensions to this issue: how to fund local environmental policies and programs and how to ensure that local initiatives meet state and federal objectives. On the first of these, we had an interesting experience last year in New York that is instructive. When the State of New York came out with its new Qualities Communities Program, it issued a request for proposals for over \$1 million in grant funding, noting that communities would compete more successfully if they submitted intermunicipal applications. The state was telegraphing a priority: intermunicipal land use planning, just as it could telegraph critical environmental area protection, for example. The response was overwhelming: \$18 million dollars in requests came in and over 85% of the applications were from consortia of local governments. This is in a state where intermunicipal cooperation is in its infancy. In the same way, if a state were to allocate significant planning and project funds for TMDL compliance on a watershed basis, we expect the response would be equally enthusiastic. Remember, it is local citizens who suffer most from the degradation of water quality and who understand that their water resources are intermunicipal in nature.

Malone: The NAS report was really interesting because it was used to kill the July 2000 regulation. It was used in areas of political evaluation that were highly questionable to say the least in terms of what the report actually concluded. For example, it did

say that ambient water based regulation is feasible, even though we need more science, and there is uncertainty, there is always uncertainty. There is quite a bit in that report that supports having a TMDL program that actually means something and imposes mandatory controls on nonpoint source pollution. It was quite simply manipulated, in addition to whatever problems there might have been in the report, and it was characterized as something it wasn't entirely.

Weinberg: I'm sitting here thinking there is a kind of model for what you all are talking about and that's the New York version of the Coastal Zone Management Act, the Waterfront Revitalization Act, where New York elected instead of California and some other states that had a statewide coastal management program, taking the federal king's shilling and spending the money that way, to just pass it through a state agency and give it to the towns. But because the politics favored that happening, and you'd have to somehow build a political consensus for that to happen, for the state to want it to happen, and maybe put your finger on why municipalities, cities and towns and so on might really want that to happen, because of the impact it's having on POTW's. That might be a place to look at least for a model, but you still have to build that political consensus in order to make it happen.

Daly: Are you aware of some of the work that's been done in Germany on storm water management plans? They've come with a very interesting way. Their theory was that we can clean up the rivers, but let's stop the pollutants for getting there, a lot of which was the industrial sites. So they calculated a tax based on impervious surface, which included any parking lot, any impervious surface, including roads, and the tax is paid to the municipality who is charged with monitoring the water quality. But what it did was it created an incentive for the industries to solve their water problems and they created green rooftops and they created multilevel habitat design, which would take the water back into the natural systems. And what they found was that they reduced their pollutant loads from industrial and fill development by almost 75%.

Malone: The comparative examples make us look so extraordinarily backward. What the EU has done with fertilizer and fertilizer application I've been emphasizing to agricultural interests for years. It's going to happen eventually, why not become part of it? The procedures are going to be regulated. You can see how little

I've had in this regard. I do think it's inevitable at some point, and do they want to be confronted with the situation or play a role in how it will be developed? There are so many ways that the federal government can regulate what's happening on land and one way is to regulate that application which is causing severe water impairment.

Turner: Linda, why do you think that the agricultural lobby isn't just more interested in adopting best management practices like conservation tillage, bare application of fertilizers, integrated pest management. Because with agriculture increasingly concentrated in large companies now, you would think that it would be more in their interest because these are actually more economically efficient than basic agricultural production in the long run.

Malone: All I can do is convey personal, anecdotal reactions and information. I think that a part of it is a feeling that if they give an inch, then they've given up their immunity from regulation in so many ways. It's another myth that agriculture is not regulated. With the concentrated animal feed lot regulations, and other regulations there are more measures to regulate agricultural nonpoint source pollution. I think it's just a highly politicized reaction that if they concede to mandatory regulations and go down that road, they'll be conceding whatever exemptions and immunity to regulation they have in a more widespread way. It's hard to explain otherwise.

Cannon: I was interested in hearing your thoughts, further thoughts, on this tension between the interests of sewage treatment plants and other point source dischargers and nonpoint source dischargers. If you take the act on its face, as requiring compliance with water quality standards and limiting point source discharges to the extent necessary to achieve water quality standards, those folks have to be really concerned because they assume that nonpoint sources aren't going to be limited appropriately. And nobody's trying, in all of this fervent debate, I don't hear anyone trying to change the basic structure that drives that problem for the point source discharger. Nobody's saying that the safety net requirement, meaning water quality standards, and eliminating point sources is going to be achieved. So I'm interested in your thoughts about why AMSA and the other point source groups haven't been stronger or more effective, do they see that their going to get a break some how or?

Malone: I think it is a relatively new perception, that is my sense of it. They haven't made the linkage until, maybe, in the past year – if nonpoint source pollution is not regulated, the burden could fall on us again and we could find ourselves subject to another layer of regulation as it's easier to regulate more what you've already regulated than to regulate something new. So I think that is the main thing, but I think they are wising up. I think that's why there's this prospect that out of total self-interest, and self-interest that I would applaud, the municipalities and local governments generally may be more attuned to this and become more proactive in seeing that something is done. I will tell you that there are some comments in American Farm Bureau documents suggesting a change in the basic structure. They were suggesting to the states that one way to deal with this TMDL program is to change your water quality standards, by indirectly lowering them, and change standards from primary recreation to secondary recreation. States can tinker with what the water quality is going to be and have more leeway.

McElfish: It's not just the Farm Bureau that's doing that, but a number of states are moving in to the delisting approach that EPA is beginning to support which basically allows taking water bodies off the list or not putting them on the list if the data are too old or there's not enough data. And one of the hidden issues that comes up, I think again and again, and they come up on the local government task is there is not a lot of information and there is very little investment in gathering information. So, this year, again, the proposal is to cut back USGS National Water Quality Assessment Program, which is a very small program, but it's the only national program we've got. So if you don't know your waters are impaired, then there's nothing to plan for.

Malone: Well, my own state of Virginia has been leading the race to the bottom and has come up with a water quality standards program where in deciding what the water quality has to be, they have two years to see if it can be unimpaired by voluntary efforts. Well, that looks a lot to me like just allowing two more years to do nothing. The waters are impaired, but let's just see if something changes in the next two years.

Philip Weinberg

I'm trying to do a shotgun approach, but the overall theme is the impact of federal and state laws on local ability to do some-

thing. There has been a roller coaster development of law since Euclid in the 1920's. There has been a rise and fall of substantive due process and federalism. In 1915 New York City passed a zoning statute with an emphasis on localities keeping out "bad" uses. No one thought of environmental issues when they first started with zoning. States passed laws to override local zoning for things like power plants and hazardous waste sites.

Now the wheel has turned full circle and towns are becoming more sophisticated than states. Federal environmental consciousness is down, and municipalities have largely increased their environmental consciousness because it has fallen to them. Towns now have laws to protect wetlands, and prevent development on steep slopes.

Some states have a top down approach, like Hawaii, Maine, and Vermont. New York is finally starting a bottom up approach, with local environmental regulation.

My main focus is on the extent of federal and state preemption or enabling of towns in these environmental areas. In the CWA, CAA and RCRA – to a large extent these statutes allow state laws to give towns slack to legislate beyond the state mandate and state laws encourage them to do so, at least in New York. As long as local laws are not inconsistent with state CAA implementation laws, the local laws are valid. State laws do not preempt New York City's regulation of incinerators. There needs to be a direct conflict between the local and state law for the state to preempt the local government. The same is true for the CWA and RCRA regulations. Local governments also traditionally regulate solid waste. Hazardous waste is of course different, and due to the dormant commerce clause, localities cannot pass laws keeping waste out of or in the locality. Hazardous waste is not so clear as courts have interpreted legislative intent as having it regulated only at the state level via RCRA. Towns have more slack in regulating cleanup under CERCLA.

A local example is the GE PCBs-in-the-Hudson-River debate as to what to do with the PCBs in the river. The EPA directed GE to clean up the site and left disposal aside for now. In an earlier order to GE to clean up the site, there were problems because the Hazardous Waste Siting Board directed it to place the waste in the towns where it was generated. The towns zoned out that siting and at that time, the state could not override the local law. Since then the Legislature has overruled the court that said local law could not be preempted in this respect. Now, zoning laws can

be overruled by the state in this area, siting hazardous waste sites. In the area of wetlands, towns have the authority to go beyond federal and state law. Many states follow the same pattern as New York and allow local governments to go farther in most areas, with power plant and hazardous waste citing as common exceptions.

Agricultural feedlots are becoming an issue as to whether local governments can go farther than federal and state laws. Some courts have ruled that they can and others have ruled that they cannot. If the municipalities could get money, they could truly regulate many areas of concern. Maybe the time has come for the local governments to play a major role in environmental issues.

Comments:

Turner: Phil, I'm a little bit more worried about field preemptions' possible effect than you are. As an illustration, you cite a Minnesota case from 1998 involving odors, from feedlots, well, since then, Minnesota's ECA has promulgated a rule that has very specific provisions in it on how odor is supposed to be scientifically detected with the use of instruments and how this sort of panel of sniffers that will come out, etcetera, etcetera. My concern is that a lot of the no preemption cases were decided before the advent in the 1990's of extensive regulation based on the federal part 258 regulations for solid waste disposal or others promulgated at the state level that really, significantly strengthen state regulation in these areas and provide for much more succinct regulatory controls. And since we haven't really seen the infusion of lawsuits since the end of those of those rules, I wonder if you might share my concern. If you might see the tide begin to shift with regard to how courts interpret these no preemption claims.

Weinberg: But, I certainly agree with you, to the extent that the states become more enlightened about dealing with these problems, they could seriously succeed in arm wrestling the agribusiness lobby down so they could regulate feedlots. That's fine. No problem with that. I guess in Minnesota, Iowa, Missouri, where those cases occurred, it was a case of the states, at that point, not having done very much, so the towns wanted to get out in front. And maybe they'll lose some battles but win the war, getting the states, as you say occurred in Minnesota, to regulate more stringently than they have. And that'll do it, as long as some level of government does the regulation.

McElfish: Have you run across any trends in any states where there's more state deliberate preemption recently of local action. I'm reminded of Pennsylvania revising its municipalities planning code a year ago and forest industry went in and they got forest harvesting and forestry made a use by right in every zoning district in the state. And I'm wondering if there are other instances of that you've seen like that in your research.

Weinberg: No I haven't, and I'd be interested to know more about that; in fact I'm making a note (if I can get this pen to write) about that, because that would be a troubling development to the extent that it would block the municipalities from being able to regulate it at all and if there were no state regulations, that's unfortunate.

McElfish: There is none.

Weinberg: That's very troubling.

Nolon: In New York, there are a couple of provisions of law that move in the direction Jim mentions. First, our enabling acts recommend that local comprehensive plans have a component on agricultural land preservation. In fact, that objective is the only land use principle contained in the state constitution. Further, New York statutes provide for the creation of Agricultural Districts. Where a district has been established, a local land use law that prejudices agricultural activities in the district is prohibited. This is the only instance I know of in our state where a local land use law can be overturned by a state agency, in this case Ag and Markets. This has happened only a half dozen times. Case law is emerging that sustains this scheme.

Weinberg: And there's the recent Court of Appeals case that just came down (*Town of Lysander v. Hafner*) about the town that prohibited trailers as farm worker residences and the Court of Appeals said that the town couldn't do that because it was inimical to agriculture, which was probably a good result, but again didn't do the ability of towns to legislate any good.

Salkin: As we move the discussion from purely local land use control to widening it or broadening in talking about land use control as a way to effect environmental control and environmental management. I guess I become less concerned necessarily about the preemption issue, than when it was purely land use decisions and that's because I think that open space you can do at the town level. You know you can do conservation easements, you can pre-

serve a certain percentage of land coverage for open space, but you know on some level, and maybe you and I will do this tomorrow when we talk about regionalism, that the air crosses over the artificial boundary lines, the water crosses through the artificial boundaries. You know Jon's written about this before as well, is it purely a matter of local concern? And if the local governments can't effectively and can't get together to deal with it on a regional level, than I'm not so sure that in certain cases for certain kinds of environmental goals that preemption is necessarily a bad thing.

Weinberg: Well, yes, historically of course, that was the *raison d'être* for the state and then the federal legislation, because air and water didn't respect state boundaries let alone local boundaries. But to the extent that we are seeing a backing off of environmental enthusiasm at the federal level and in some of the states, then may be there is a role to be played by the towns even in those areas.

Salkin: Now, I'm not so sure I see it on power plant issues, I see it on other issues.

Weinberg: Yes, this may get settled issue by issue. There may not be any overriding philosophical answer. In general, I'm skeptical of overriding philosophical answers to questions anyway. This is probably an example of that, that it's going to depend on a particular issue.

Wolf: I thought you were just going to say the opposite of what you just said, because when you drive through New Jersey, it's a review of exclusionary zoning. When you talk about local government autonomy, it's a frightening concept in the land use area. And one area in which at least our casebook, and I suspect your casebook, where we do talk about local environmental law is where we talk about exclusionary zoning. It's a part of the story, exclusionary zoning. It's a bit of an environmental justice issue, so I feel a little uncomfortable at a conference that talks about trying to reach noble causes while relying on local government to carry the burden. So I would say it sort of scares me. The lesson from land use law is that sometimes you can't trust the localities. Sometimes you need to preempt.

Weinberg: You can add my casebook to the list. I also wrote a chapter on exclusionary zoning, but I think we've come a long way from those cases. And that problem certainly hasn't gone away, but I think it's different from the kinds of things we're talking

about this afternoon, where there is more enlightenment on the part of the towns.

Wolf: See, I just don't know, it's very difficult to draw that line.

Weinberg: I agree.

Wolf: It's very difficult to figure out if the locality is using this as a mask, or if the locality is really interested in open space preservation.

Weinberg: Well, it's like the debate about states' rights versus federal rights. I suspect that if we went around the room here that some of us would favor greater states' rights in this area, but not in that area, and so on. There's no overriding philosophical answer.

Wolf: Perhaps there is, but we'll get to that later. I come from the capital of the confederacy where the term "states' rights" has a specific connotation.

Weinberg: I hear you. Any other questions?

Nolon: I discovered an interesting way to address the problems inherent in this preemption discussion in Latin America. In the mid-1990s, Argentina amended its Constitution to add Article 41, which promised its people a sound environment and dedicated the national government to achieve sustainable development. I went there and did some research, anxious to know how they were going to accomplish these lofty objectives. I found that in several Latin American countries, the federal legislature had adopted framework laws in the environmental and land use area. A framework law was proposed, interestingly enough, by Senator Henry Jackson in the early 1970s as a bookend to NEPA. It was the National Land Use Planning Act and it created a federal framework for land use planning and funding, what some scholars call a nested hierarchy of plans and programs, with each level of government assigned clear roles and providing certain resources. In my view, Jackson's planning act, which nearly passed, did not disturb existing expectations about the role of state and local governments, although it was hotly opposed as "federal usurpation of state and local rights." The point is that any specific proposal to preempt state or local prerogatives will probably fail, but the conversation can be joined more productively on the more general question: how can all levels of government cooperate in promoting a sound environment as opposed to continuing with our fragmented approach. According to the Yale Next Generation project,

fragmentation among our levels of government in the pursuit of environmental objectives is one of the key challenges we face. Maybe what we are moving toward is the realization that we do need a framework, an understanding of how we approach environmental problem solving more efficiently.

Vicky, thank you for giving us an unexpected international perspective; Linda, for an interesting reflection on the federal issues, and Phil for raising a number of critical issues from the perspective of the states. Tomorrow we will look at regional, watershed, and local issues, innovations, and problems and struggle to put all the pieces of this intriguing puzzle together.

Panel 2: Friday April 19, 2002, 9-10:30 a.m.

Patricia Salkin, John Turner (for Dan Tarlock)

Patricia Salkin

The focus of my paper is how the Smart Growth movement has caused local land use and local environmental law to come together in, if not a marriage, a shared living arrangement.

The paper first looks at the historical perspective and then discussed the Smart Growth movement.

In 1926, the U.S. Department of Commerce put out the first revised standard state zoning enabling act and by 1930, 35 states had modeled their zoning laws after the act and almost all followed. That is, by in large, where we remain today. Between the 1960s and 1970s the federal environmental laws came about. The shortcoming of these laws was that they lacked connectivity with local authorities. When the federal government acts, the policy and money flow to the states, not local governments. The 1970-s to mid-80s brought about more active state roles in the Quiet Movement, did again, the local governments were not a focus.

The 1990s and Smart Growth movement begins for the first time to recognize land use planning as part of sustainable development (both land use and environmental). Where we have been going with land use development is more flexibility, mixed use, compact development promoted for quality of life, economic development including urban renewal. The problem is that sprawl sells and no one wants to live in a compact development.

We did a great job in promoting environmentalism in schools, such that everyone appreciates it and wants their 3, 4 and 5 acres of it. We did not promote urban life.

What makes Smart Growth different than past reform efforts? Everything before was federal government, with the exception of the quiet revolution. Smart Growth is multi-level, bipartisan, has a sustained leadership and business community involvement. By 1999 1,000 land use bills were introduced. Between 1999 and 2002 approximately another 2,000 were introduced which is a high degree of activity compared to the past. There is a major opportunity to get to the state legislatures.

My paper discusses in more detail the land use decision-making in conjunction with the environmental ethic. The federal government's role, while not the focus, is also discussed. An unprecedented amount of money is being spent by the states for planning, but it is still too little and too late. We need a concerted effort to get more money.

The American Planning Association Guidebook, which was what I reviewed for discussion in my paper, is an effort to modernize state planning acts and to correct past wrongs. The 1,400-page, two-volume Guidebook is intended to provide ideas, principles, procedures, etc. to state and local governments. It is a must read. The philosophy of the Guidebook is to give a lot of options. It takes a "no one size fits all" approach. The environmental themes are evident.

Comments:

Nolon: Patti, does the guidebook have a point of view about whether states should preempt, direct, guide, or simply assist local governments in planning and regulation of land uses?

Salkin: I think it is a wide range of options. I think that – I don't want to speak for the directorate and the American Planning Association. So I'll speak in my opinion as I would like to read it. I'd like to read it as there is a great framework there for state governments to take hold of if they like and there is a lot of suggestions they can put in statutes like we did in the New York comprehensive planning statute that says "Your local plan ought to consider the following elements. . ." – ought to, not necessarily required, but put it out there because they don't know – it's not on their radar screen. Every planner is not created equal and every planning board or zoning board or group put together to do the comprehensive plan doesn't have access to the same resources.

Nolon: Does the guidebook address building codes?

Salkin: We kind of stayed away from that.

Nolon: Why?

Mandelker: Well, because the building code is an entirely different regime and, as you can see, we had our hands full with land use issues.

Salkin: Some of the states though are addressing smart growth, like Maryland, has made an effort to tying in smart growth efforts with building code reforms. There is a section on uniform development codes where the states might adopt a development code which speaks to some of those building code questions.

Robinson: Does it cover the cultural environment and historic preservation?

Salkin: Yes, not in any great detail other than to mention it as one of those items that ought to be considered. But there is no specific focus on historic preservation. Jim, do you want to offer the natural environment perspective on the guidebook?

McElfish: On the historic preservation side there is a section on design review and historic preservation is one issue that the National Trust for Historic Preservation is not happy with.

Been: Can you tell us what the APA plans in terms of roll-out of this and what they see as the next step?

Salkin: Well, the big roll-out was getting the guidebook out and now all of the funding that I put in the footnote from the public-private nonprofit sector is gone because that was the money that put this guidebook out. The staff person who was the principal investigator for the project, Stuart Meck, is still at APA although the other person that worked with him is not and Stewart is not ongoing with Smart funding at this point. He is out working on other projects. The director of research for APA is talking to other organizations about ideas and strategies for a roll-out but, quite frankly, there is no state legislature that I know is going to sit and read a 1400 page, 2 volume book even though there is a user manual it still isn't going to get the legislator to what they need to know. I think we need to have some high-level education sessions and workshops with APA and law schools where we invite the legislators to dinner and talk to them about some of the ideas and lobby through education and informed decision-making. There is evidence, and Stewart talks about it in the guidebook and his article, that a lot of states have, through the years seen the guidebook. The guidebook has been out in chapters in various iterations and has been on the website – it's been all over the

country. There have been a lot of state statutes that have modeled their language on the guidebook and that have, in fact, been enacted. So it is already starting to have an impact, but it just came out a couple of months ago in final form.

McElfish: One of the things I think helps in the roll-out scheme is that all available on the web and APA has made this available at the unbelievably low price of \$20 for the whole 1400 page guidebook, a searchable CD-Rom that comes with it, and the guide to the guidebook. So it's a great resource and because it covers all of these topics I've already had many occasions to use it in addressing specific questions because of the encyclopedic nature of the research. So if you have a PDR issue or a corridor dedication or whatever it may be, it's going to get a lot of use by virtue of its accessibility and comprehensiveness.

Salkin: And it's already making its way into literature much more than the ALI code did, I think because they involved a lot more stakeholders so more people know about it. But we still need to tell two friends and so on, and so on. The executive summary that you have is not of the guidebook, this is of a report that APA rolled out to go with this that talked about all the activities at the state level around the country and that's also a phenomenal report that should be read together with the guidebook and that's on their website as well. You can download it for free and they just got hardbound copies of that in the Washington office. The guidebook is out of the Chicago office.

Nolon: In looking at the table of contents of the Growing Smart Guidebook, I didn't see an emphasis on environmental regulation. I wonder, from Jim's perspective, if environmental interests are well represented in the final draft.

McElfish: Well, the environmental community is a diverse and active community. The first four years of the project it was only representatives of governmental entities. There was a great deal of interest when the environmental community became aware of this and the last two years of drafting were extremely difficult and contentious because there were a great number of issues that were of concern in the last couple of years and the environmental community actually hired someone to do the critique of the guidebook to help prepare the comments to dispute the draft. Most of these areas of concern were resolved. There was legislation in there modeled after the Home Builder's legislation and there were some issues that the comprehensive plan was not reviewed at 5-year

intervals – they would be voidable and no longer considered reasonable. And there were a lot of concerns about the turmoil that this would throw on. All of that was resolved but the process of getting that resolved over the last 2 years has to some extent affected the community's view of the guidebook. I guess I would conclude by saying that nonetheless there is a sense that there is a plan which a number of the groups including the Defenders of Wildlife and NRDC are looking towards to select portions of the guidebook and take them on the road saying "this is where you ought to go." Conversely, the Home Builders have already published their own 400-page guide to the guidebook on the things they like and don't like.

Salkin: Also on the observation – I hate to say it in this room – but, in state legislatures in the 1990s environment reform didn't sell, but economic development did sell. And that was clearly a theme in all Smart Growth legislation in the 1990s. However, the good news is that the preface in the guidebook says "People no longer believe like they did in the 19th century that land is something merely to be bought and sold. We now regard land as a resource. Where we were once encouraged the filling and development of swamps, we now regard the same wetlands as part of nature's system of flood control and important for wildlife and their habitat and that should be protected for the benefit of future generations. Where we once built without concern for scenic protection, we now value scenic beauty as an irreplaceable regional asset. We see vacant developable land as having a competing social value that can be used for construction of affordable housing or for the continuation of agriculture. We recognize that how we develop our land, at what density or intensity, will have the consequence for determining the compactness of metropolitan areas which will in turn affect how much we have to travel, conduct our lives and what consequence that will have. That's the preface of the land development guidebook. And that's where I see the marriage of land use and environment coming together. Really, the guidebook put it together beautifully.

Joshua Dolger (student): I have a somewhat global question from somewhat of an outsider perspective. You touched upon the fact that the environmental movement sold people this love of the outdoors and now, as a result, people don't want to live in tight communities; they want their five acres. So how do you address that aversion to this living in bettered planned space?

Salkin: I think that we have to re-look at environmental education and take less emphasis on ecology and more emphasis on air quality and water quality and compactness and also include an urban development and urban redevelopment component in there. I have a son in 1st grade. He came home from school a couple of months ago when there was a substitute teacher and he said, "I'm upset." I said, "Why are you upset?" He said, "because we don't have any water and we're going to die." And I said, "What do you mean we don't have any water?" We have a water drought in our town and he said, "We don't have any water left and the City of Albany doesn't want to sell us any more." And he got all upset and I give that teacher - whatever kind of politic they were trying to infuse in the classroom - at some level my 1st grader understood that we shouldn't take long showers and we shouldn't waste water. It's possible to engage really young people in that kind of discussion rather than just the nature walks.

Malone: There is some new bent in agriculture - Preservation, and it has more to do with historical preservation or open space rather than farming.

Salkin: It is more of an open space issue - you need to have critical mass to get enough farms.

Nolon: If we had a nonpoint source pollution prevention code and purchased development rights or conservation easements to prevent nonpoint source pollution, those easements could mandate best management practices.

John Turner (for Dan Tarlock)

Before discussing the role of local governments and regional entities at the sub-state level I'd like to discuss why this is so important. Between 35-45% of the nation's rivers and waters remain impaired for at least some beneficial uses. Threats to human health continue through contamination of spring waters, shellfish, freshwater aquatic species, ecosystems on which they depend are threatened and remain impaired due to chemical pollution as well as widespread habitat loss and impairment and serious depletion of in-stream flows as a result of excess water withdrawals.

The good news: In the last decade we've had some reductions in health risks from contaminated drinking water due to a combination of source water protection efforts and new drinking water disinfection and other requirements. We've had additional funding of local government water treatment facilities. Water-borne

disease outbreaks show declining trends. Virtually all U.S. residents have access to some form of adequate drinking water supply – whether from public systems, private wells or some other source. But states still report that about 9% of rivers and 14% of lakes cannot support public drinking water purposes and 11% of the U.S. population is served by drinking water systems with reported violations. So, the problem is widespread. EPA has found widespread presence of biological and chemical contaminants in drinking water systems. Species that depend on freshwater ecosystems show decline. So, the good news is outweighed by the fact that improvement of water quality has stood still over the last decade. The federal government has yet to articulate, much less implement, a true watershed management scheme.

These problems of rivers and lakes being use-impaired, habitat loss and degradation suggest there needs to be new ways of thinking about how to address them on a watershed basis. Dan's paper talks about local, voluntary initiatives – a few of which have financial support from the legislature.

There really isn't any means of accountability, and ultimately, enforceability in these plans. One cannot address aquatic restoration without focusing on non-point source pollution – one cannot just look at the individual source of chemical discharges. The widespread impairment we've seen results from a diverse range of activities, ranging from watershed to watershed, including municipal and industrial point sources, problems such as erosion and runoff of agricultural chemicals, hydrological modifications, modifications of water bodies and changes that have occurred to aquatic and upland habitat. There is some hope that diverse problems can be addressed holistically. A good watershed program must look at a whole range of pollution sources within a watershed and evaluate fully the scope of possible solutions and target funding and resources to solve this problem. But, we must go one step further because to really be effective on more than an isolated basis, these programs need a guided focus, which does not seem to be coming from EPA or any other part of the federal government. What is needed is a means of accountability and enforceability. The question is: Where is that going to come from, and how will it be developed, and what legal obstacles are there that need to be addressed in overcoming it? There are also water quantity and water allocation issues because CWA water quality standards link water quality and water quantity. Moreover, we cannot talk about a TMDL program which is supposed to allocate

among various sources the maximum amount of pollution that can occur without violating standards. We cannot evaluate that program adequately without looking at the same time at water withdrawal. There is a lot of data that suggests that Americans are particularly wasteful with water usage (private homes, businesses, agriculture).

Dan's paper is not yet "complete." He gets to the point of discussing why this is a good thing, but we need to finish up the paper, so to speak, and discuss how to overcome these obstacles. There has traditionally been a bifurcation of looking at legal rights and responsibilities for land versus water. How you put all that together is yet to be seen. However, there seems to be some ground for cautious optimism that these watershed management programs at a local level can help fill some of the gaps that the federal government has been unable or unwilling to do through the TMDL program and planning process.

I would like to add that some environmental groups have not been particularly excited about watershed planning because of the emphasis on planning rather than on doing. So, again it is important that we move from merely creating plans to having some sort of implemented and enforceable mechanism for making the plans a reality.

Comments:

Malone: Dan's paper also focuses on water rights allocation problems – which is really critical and a serious problem. He doesn't know how that is going to be addressed because the states do exercise so much control on local water allocation to the extent that plays on watershed planning. I'd like to hear from those with stronger backgrounds on local water allocation.

Nolon: Here's an example: In Connecticut, the state adopts a plan of conservation and development and state agencies are deeply involved in water allocation and water quantity issues. Regional agencies have plans of conservation and development, most of which do not deal with water allocation and supply. Local governments, too, are required to have such plans and their zoning is required to conform to them. But, local plans do not deal with water allocation and supply, yet their zoning ordinances and maps dictate future water demand by providing for population expansion within the jurisdictions of water companies. Water companies are required by the state to project water demand 50 years

forward and have only the thin reed of local planning and zoning, plus past population numbers, to lean on for those projections. In other words, in a state where “planning” is mandatory at the state, regional, and local level, there is no coordination between water supply and demand planning and implementation.

Sean Nolon: Many of the questions concerning how to coordinate stakeholders and different governmental entities that are involved in negotiations that will impact natural resources have been addressed by the environmental mediation community. Experienced neutrals have had considerable and documented success helping disparate groups (geographically, politically, and ideologically) reach agreements on specific development proposals, natural resource management plans, and other environmentally significant public policy decisions. While these examples have been documented extensively over the last 30 years, most disputants and decision-makers are not familiar with the techniques that can bring the parties together – nor are they in a position to do so. Most importantly, neutrals can be used to make sure that any type of collaborative, supplemental process used by the decision-makers is accountable, responsive to the interested parties, and implementable. Collaborative negotiations that are conducted without the aid of a neutral are in danger of being co-opted by the more powerful parties in the group and producing lop-sided agreements that may ultimately be challenged in the courts.

Turner: John [Nolon] has described that statutorily created separate authorities that have no legal responsibility to coordinate. . .so how does mediation address jurisdictional differences and problems?

Sean Nolon: Consensus based processes, like mediation, are best employed when all the interested parties are willing to participate. When local leaders realize that their jurisdictional differences are a major barrier to effective land use decisions, they are more likely to utilize a collaborative process to address cross-border issues. The key is educating decision-makers about the process used to make decisions and how this process is only a legal minimum that can be improved through supplemental consensus based processes. Once decision-makers have this view of the process, they are usually more willing to include entities that might not have parallel jurisdictional authority. As a short answer, mediation does not address jurisdictional differences without the par-

ties recognizing the limitation that accompanies strict adherence to those political differences.

Been: Why shouldn't there be more focus on proper pricing and taxes? This should level the field and help get around these jurisdictional issues.

Turner: Decision making on water pricing is made by entities that are going to be very susceptible to local pressures from these kinds of interest groups.

Been: Then why wouldn't the focus be on using impact fees?

Salkin: The largest users are business users, with big legislative power.

Been: The suggestion of getting at it through market forces is OK in urban areas, but in rural areas people take their water from wells or springs.

McElfish: Pricing schemes must take into account instream flow.

Callies: Dan's paper reminds us that as important as local environmental laws are going to be, some things defy local solutions. One elects a local council to represent local interests. But, watersheds are more than local and must be viewed in a regional framework. Instream flows are a macro-micro problem. If instream flows are purely for an ecological reason and are not directly tied to human health and safety, then impact fees are going to be defective in the face of property rights issues.

Malone: One thing that worries me overall about local governments taking the initiative is that there are so many crazy court decisions. Court of Appeals decisions no longer have the significance they used to have because of splits among circuits. Dan's paper refers to a New Jersey decision which concluded that New Jersey's right to farm law preempts local regulation of non-point source pollution; this decision is insane. It is difficult for local governments to ignore such decisions. You can find whatever you want to support your legal position. There are four models of right to farm laws – New York is one model. But what is going to happen is that local government is going to say "Oh, the right to farm law has been held to preempt local regulation of non-point source pollution" and be afraid to go there.

Mandelker: This is statutory. The farm lobby has been very aggressive about that legislation – it is written, it's not the courts. This is partly why watersheds are a real problem - we have a

whole series of overlays including the agriculture district law that preempt local government that the farm lobbies brought in to protect their particular interest. Dan points out that early federal pollution laws were adopted to remedy interstate competition problems and dealt with pollution of major polluters based on “bad guy – good guy” philosophy . . . that model doesn’t work anymore. NPS has undone all the gains in PS control and that is what pushes us back in the local arena.

Wolf: Are there any positive lessons we can learn from CAA under SIP program?

Cannon: One big difference between CAA and CWA: TMDLs are like SIPs but SIPs have to have enforceable measures. States have to come forward with some program that is enforceable and can be enforced by federal authorities which is clearly not part of TMDL program.

Robinson: Two lessons of CAA do give us useful things. For example, the City of Los Angeles having no way out has got transferable permits for increments of discharge which always have to be twenty percent lower than prior. So they’ve enforced through their SIP (local initiative) to come up with market based solutions. Other is analogous to redefining who has an interest in the landscape and how to do you manage the landscape – and that is the PSD (Prevention of Significant Deterioration) provisions and the management of increments and visibility standards which is fundamentally a landscape issue, I think. The inconsistency of how SIPs have been shaped in different states and failure of EPA to come up with a consistent approach to the SIPs, the weakening of section 110 through legislative amendment over the years and the total abstigation of the transportation plan of the SIPs has made it problematic.

Weinberg: What incentives can we offer municipalities to take this seriously? Idea yesterday came up that one thing is that they have to run treatment plants (POTWs) and to the extent this could interfere with the operation of the treatment plant is a reason to do something about this. Can anyone think of other things to sell town on this with.

Robinson: Patty, in your 12-15 chapters is there a section on a state enabling act for interregional water management that could bring in the water pricing question raised?

Salkin: There is a lot on regionalism but it doesn't specifically address what would be the core environmental concerns.

Panel 3: Friday April 19, 2002, 10:45-2:15 p.m.

Donald Stever, Jayne Daly, Kathryn Plunkett, Daniel Mandelker

Donald Stever

"Necessity is the mother of invention," says Don Stever. This paper examines the practical application of local land use law in the context of turning an area of abandoned industrial blight, a defunct GM automobile plant, into what will soon be an economically productive and aesthetically appropriate site within the historic Village of Sleepy Hollow.

The GM plant is located on 100 acres next to Kingsland Point Park. It was the oldest continuously operating automobile assembly plant in U.S. When the plant was operating, it accounted for 20% of the village's tax base. In the 1980s, however, it became apparent that the assembly plant needed to be retooled or it could not continue to operate at a profitable level. When it became apparent that GM did not wish to continue to invest in the plant, the Village realized that GM would, as it ultimately did, simply lock up the site and walk away from this massive industrial property. Faced with a major land use change, the Village started to look at what it could do with the site.

Town officials looked at the tools that the Village had to force GM to do something about the abandoned site. The Village's only tools—Euclidian zoning and subdivision ordinances—were not sufficient to force GM to clean up the site after they had abandoned it.

Thus, the Village was faced with two problems: what form should be used to cast redevelopment of the site, and how to get the site into shape so it could be redeveloped. In that context, the first major problem was tearing the buildings down. The site contained approximately 3 million square feet of buildings that contained asbestos. The cost to tear these buildings down was estimated at \$30 million. Clearly, no developer would be willing to undertake redevelopment of the area with this type of initial liability.

Ultimately, the Village found an example of how to deal with this situation by looking at the New Jersey Industrial Site Recov-

ery Act (ISRA). This act requires industrial property owners who are closing a property to study the site and get an approved clean up plan from the New Jersey Department of Environmental Protection or certify that property does not need environmental remediation. The Village considered the potential of this law and found that under the New York State Constitution it was likely that they had the authority to adopt such a law. However, it became apparent that they needed a law that could do more than ISRA since they wanted the buildings torn down by GM. Thus, the Village drafted a law which required an owner or purchaser of an industrial site to tear down the site within 18 months of shut-down, as well as clean up the site to background levels of all contaminants.

GM, of course, did not like the Village's new law and sued the Village in federal court, claiming that the local law was unconstitutional under a wide range of claims. The Village entered into a settlement with GM, in which the Village promised not to enforce this law if GM would clean up/remediate the site and tear down plant under DEC supervision. In addition GM gave the Village the option to purchase the site if the property was not sold in five years.

The next problem was how to redevelop the site since the Village did not have a master plan. The Village decided that New York law allowed a local waterfront revitalization plan (LWRP) for coastal villages. The plan has the force of law once it is adopted by Department of State and can trump local zoning law. Since the Hudson River is tidal, and the site is adjacent to the River, this site fell within the scope of this New York statute. The Village wrote such an LWRP that incorporated the entire village as the waterfront. Once planning principles were adopted the Village adopted a consistency review law which requires any significant land use change in the Village to be consistent with principles of LWRP, even if it is an as of right development under local the zoning ordinance. The Village then canvassed the community for broad public input and wrote a programmatic EIS for the LWRP.

The second part of Sleepy Hollow's LWRP addresses the GM property, and the Village rezoned the site as a riverfront-zoning district, and then developed guidelines providing that any development must be pursuant to the master plan. It was important that the entire site be developed as an integral whole, thus the smallest parcel allowed would be 50 acres. Among other provi-

sions there are height guidelines, bonuses, and incentives for developers.

Today, GM has lived up to its promise and has torn down the buildings and cleaned the site. There is an excellent developer who is proposing to develop the whole site in accordance with the Village's riverfront-zoning district and LWRP. Thus, in this instance the process worked; the Village transmogrified other laws and used them for what the Village needed in its particular circumstance.

Comments:

Weinberg: Can you describe a little bit what will be in the development, particularly the hotel you spoke of?

Stever: Well, Phil, there's the "Tarrytown" Lighthouse, which was functional before the plant was there, but which could no longer be seen after 1954, because the plant was huge and dwarfed it. In fact, the Government turned it off because the plant had a huge light on top of it that the mariners could see better than the lighthouse. Beekman Avenue, which is the commercial street in the Village, runs essentially to the river. What the developer is proposing to do is to extend Beekman Avenue right down to the Lighthouse so that as you come down the street, what you see at the end of the street is the Lighthouse. He's going to build a new village which is an extension of the inner Village. The main street will be characterized by buildings with retail shops on the bottom, residences on the top, sidewalks - the whole thing is laid out as a walking community. You can drive down there, but all the parking is proposed to be beneath the buildings, and so you will get a sense that you're in an old river town. The hotel site is over here (reference to slide) but there is discussion about putting it back here (reference to slide) closer to the Historic Hudson Valley. You could then walk from the hotel to Philipsburg Manor, where you could walk down into the Village from the hotel. There is discussion of putting in a railroad station because one of the concerns we expect to have in dealing with Tarrytown is traffic. The assumption is that the housing being proposed is market-rate rental housing. Sleepy Hollow's primary problem in maintaining a viable commercial district is that there aren't enough people living in the vicinity of Beekman Avenue to have a viable commercial district. The market-rate rental housing produces buyers, but it doesn't produce children that clog up the school district and it doesn't produce a lot of automobiles if you design it so

that people who chose to live there are commuters. We've had several linkages studies in which we brought the developer and the community together to discuss and included Tarrytown. We don't know exactly what the developer will ultimately do, because it is his development, but we know the basic outlines of this development.

Mandelker: There has been an explosion of this type of design sensitive planning across the country. There are two types: projects centered like this, where you have a specific project that will get this, or else it could be more generically design centered. One of the best examples of this is in downtown Tacoma, which is on my web site, if I can put it in a plug, its landuselaw.edu, it's totally free (laughter) and you can see what they did in Tacoma. I have been very impressed—and this may not be strictly environmental—at the extent to which this kind of design specific planning is a new way going about regulating land use that's different than this Euclidian model.

Been: Can you talk a little bit more about the lawsuit and the takings challenge to the requirement that thy take down the building?

Stever: Well they did have a 5th Amendment takings claim in the lawsuit. But, I think we would have won it. I wasn't too concerned about it because the way we had written the teardown requirements was with a view towards the existing law on non-conforming use termination. We looked at the New York law on that and decided that if we wrote the law to give the industrial property owner a reasonable period of amortization of hte investment before requiring teardown, and we coupled that with findings about avoiding the development of nuisance conditions, hazardous conditions and so forth, the law should survive. There were four or five other constitutional claims, but that is the one which I had anticipated they would throw at us, and at the end of the day, they must have felt that the Village had a strong enough case to support the requirement to settle rather than fight. When they came back with the first draft of the settlement they said they wanted to tear it down in five years, and we said no, we want you to tear it down in one year. And we ultimately settled on eighteen months. Would we have won it? I don't know, but I think that we had a best shot at winning because of the way the law was written.

Wolf: I was wondering about the original building because you talked about the historic significance of it.

Stever: Well, Nick Robinson ought to talk about that.

Robinson: In the mid-80s, as you remember under the historic preservation laws, there was a fear for a time that National Register Listing would result in freezing industrial properties. Remember that great debate? Well, before that debate was resolved, they, in the dead of night, tore down the one historic building on the site.

Wolf: It's interesting to me that you just said that. I love the phrase you just used because I went to Charleston recently. I was taking a carriage tour, and the guide who was giving the lecture was a high school history teacher, and he certainly was into it. We came to a parcel that had no buildings on it; it looked like a construction site. Someone said, "What's going on here?" because the guide was giving a lecture on historical preservation and how it was born in Charleston. The guide said, "That was a bank building that was built in the 60's, but it has no historical significance." And I was thinking of this GM plant: it was built in the 1950's, and it has a lot of historic significance. You told them to tear it down?

Stever: Yes.

Wolf: Isn't there anything left of this GM Plant?

Stever: No.

Robinson: Well, there is a union hall that the UAW had, and there are proposals that the UAW union hall should have a historic exhibit with the brick-a-brack and trappings and photographs and history of the site. So, you could actually see a part of the historical component.

Stever: Believe me, these buildings were not architecturally significant in any way. I think there should be some memorabilia—for example, we could have a street "Stanley Steamer Avenue" (laughter). One of the things that happened early in the process, the Village participated in but didn't initiate, was a study by Andersen Consulting, paid for partly by GM and partly by the State of New York, on re-use scenarios for the site. This analysis looked at various re-use scenarios. One of these was an industrial use, which would have kept the buildings there. Interestingly, the conclusion was that given the demographics and cost of living of Westchester County, no industrial use would be viable, except,

perhaps, a movie sound stage. Conceivably, a sound stage could have been put into one of the buildings, but then what do you do with the rest of the site? The conclusion was that it wasn't a viable re-use scenario for that location. Similarly, you might ask, why wasn't it developed into an office park? Well, there's no good access for peak hour commuters. It's down on the River, there is no big highway nearby, and so you can't get people in and out very easily. The Anderson study concluded that the best re-use scenario was what it is evolving into, having it become part of a village, where people live, and a destination where people go by public transportation, not by automobile.

Jayne Daly

Contrary to what your program says, I hope my paper is not about using zoning to prevent construction and debris landfills. While that is the context for the Dover case study that I will be talking about, the lessons that can be drawn from this analysis are applicable, I believe, to a much broader set of issues. These are lessons about leadership development, regional resource protection and the challenges presented by the complexity of the system at the local level.

I'd like to spend a few minutes introducing you to the Town of Dover. It is located in Dutchess County and unlike the western portion of the county; most of the eastern towns are still rural, although development pressure is seriously increasing. Farming is still a significant land use in the Town, along with residential development. There are some commercial establishments. The largest employer in the region, the Hudson Valley Psychiatric Center closed in 1994, leaving many people unemployed and many homes vacant – housing which was built for the workers at the Center. Aside from residential growth, the other significant pressure in the region comes from mining. While most of it is for sand and gravel, there is some quarrying and well as underground mining. Mining on agricultural land is also a permitted use under the Town's laws.

Dover lies in a region called the Harlem Valley, which runs along the eastern side of Dutchess County bounded by East Mountain and West Mountain, part of the Berkshires. Because of the geologic formation of the Valley, the region has some very important natural resources. It is part of the Great Swamp, the second largest freshwater wetland in New York State. It has rare and endangered species and habitat – such as the federally listed bog

turtle and a valley bottom aquifer that supplies water to 20,000 residents in the region.

The controversy of the Palumbo site began in 1992 when Palumbo submitted an application to the New York State Department of Conservation to modify its existing permit to mine sand and gravel in the Town of Dover. The mine had been in operation for 35 years at that time and they had mined approximately 200 acres. The modification that they sought was with regard to reclamation. At that time, the permit called for reclamation with silt and wood chips. Palumbo sought to modify the permit to allow for reclamation with Construction and Demolition debris. They estimated that reclamation would take 20 years and involve approximately 27,000 tons of debris. One important fact to note is that the mine was operating in a medium density residential zone – a nonconforming use for the property.

When the community found out about Palumbo's interest in creating a construction & debris landfill, many became very concerned. They were in the process of revising their Master Plan, which had been created in 1966, and the community was already concerned about the number of mines in the area and the possibility that these uses would someday overwhelm the Town and change its character.

In response, and as part of the planning process, the Town hired an engineering firm to study their drinking water supply and the more they learned about the aquifer, the more determined they became to stop the construction and debris landfill.

So they began to consider legal strategies. They briefly considered pursuing federal designation of the aquifer as a Sole Source under the Safe Drinking Water Act, but decided that it would take too much time and not afford the kind of protection that they were seeking.

They then decided that the best option would be to have the DEC designate the aquifer as a principal or primary aquifer, a designation which is given to certain aquifers based on geology and productivity. The designation as a principal or primary aquifer would prohibit the construction and debris landfill and protect the water supply for the entire region. The applicant, during the SEQR process on the permit application was told to look at the issue of whether the site was located over the aquifer and whether the aquifer met the state's criteria for principal or primary designation. The applicant's investigation reported that the site did

not overlie the aquifer and that the aquifer did not meet state criteria for designation.

The Town countered with its own engineering studies that the site was indeed over the aquifer if you follow DEC's guidelines and look at a one mile radius of the site; and that the aquifer did meet the criteria for designation.

After reviewing this information, the DEC made a determination in 1996 that the site did not overlie the aquifer and that the aquifer did not meet designation criteria. The geologic formation was such that it was not a completely contained aquifer and therefore did not meet state guidelines.

There are three theories as to why DEC decided not to designate the aquifer. First, that DEC's primary aquifer criteria are so strict that they did not have discretion to designate the Town's as such if it did not exactly fit their model. The second theory is that the economic impact of designating this type of aquifer (non-contained bedrock) would be tremendous because it would prohibit mining and restrict development in not only Dover, but also in many other areas with bedrock aquifers. The third theory is that this type of aquifer is common throughout the state, and such a designation could set the stage for others and place an unmanageable burden on DEC's already restrained resources.

The Town's next option was to go to the Department of Health (DOH), which can issue regulations to protect drinking water; however, the Town was told that the wait for such regulations was three to five years and as time was of the essence, this approach was not pursued.

When it looked as if there would be no help from the state to protect the resource at the regional level, the Town decided to focus first on prohibiting the construction and debris land fill and next on designing a long term protection strategy for the regional resource. Early on, DEC made a determination that what the applicant wanted to do could not be accomplished by modifying its permit, but rather required a Part 360 permit – to operate a solid waste facility. This was a critical finding because since the Part 360 permit was a new permit, the applicant would have to comply with all local ordinances and in this case, Palumbo would have to make an application to rezone the property from residential to industrial, as well as comply with other local regulations and review.

In 1999, during the DEC adjudicatory hearings on the Palumbo permit, the Town adopted a new zoning ordinance to im-

plement the findings of the revised master plan. The zoning ordinance had several new provisions and overlay zones, but of most relevance to this discussion, there was a provision that prohibited non-municipally owned construction and debris landfills. Recognizing that even if the applicant prevailed on getting a Part 360 permit, the Town would prohibit the development of a construction and debris landfill, Palumbo withdrew the application before DEC and filed an Article 78 proceeding alleging that the Town had violated the provisions of SEQR in reviewing the new zoning ordinance. The Court upheld the zoning, finding that even though there had been technical violations of SEQR, these were not of such a nature to void the actions of the Town. As a result, the construction and debris landfill would not go forward.

What is important to remember is that this was the first step in the Town's two-step process. It then became a priority to develop a regional resource protection strategy. The Town, with the help of a consultant, drafted model regulations to protect the aquifer, which could be adopted by all municipalities in the region. Unfortunately, for a variety of reasons, some municipalities have been slow in adopting these regulations. Until these measures are adopted, it is possible that the mining and landfill operations may simply relocate to these towns and threaten the water supply collaterally.

There are several lessons to draw from this case study. First, for all the reasons stated thus far, there is an overwhelming need for municipalities to develop a regional strategy to protect their natural resources.

Second, local laws play an important role in protecting natural resources. While we often think of the state and federal statutes as being the guardians of our waterways and air, more and more local laws are catching what falls through the cracks of the state and federal system.

Third, it is very challenging to be an effective local official. The system is complex; the job requires a tremendous amount of time and dedication, awareness and education. It's no wonder that many supervisors and mayors run unopposed or that it is difficult to find volunteers to serve on local boards.

Fourth, if we don't focus on supporting the development of local leadership, then all the discussions about local environmental law and smart growth will be for nothing because the ideas will fall on fallow ground. Local officials need training, financial sup-

port and enhanced community process, within a regional framework.

One last thing that has not been discussed thus far in our conversation is the enormous impact that taxes, particularly school taxes, have on communities. Since in many cases, residential development costs more in services than it draws in revenue, there is a need to derive additional financial support through commercial or industrial development. The tax issue is an important obstacle to smart growth and must be dealt with if we are to achieve long-term success.

Comments:

Wolf: You mentioned in the article that they went to the Zoning Board of Appeals because the argument was made that this will be a non-conforming use. And, according to New York law that would probably be true - you can't make a more intensive use of a non-conforming use. You risk losing it. But, something weird happened. According to the article, the Board wouldn't actually come to a decision. This issue could have been solved - the initial issue - right then and there. And then the lawsuit would have been brought and they definitely would have lost at that time.

Daly: There were some local irregularities in the beginning with the Planning Board and the Zoning Board, but in terms of the Zoning Board— the applicant's representative went to them before an application was submitted and asked for an interpretation of the zoning ordinance. The ZBA has no authority to issue opinions absent an application, so the members of the board issued unbinding, individuals opinions.

Wolf: But didn't they tell them it wouldn't be a problem?

Daly: But that doesn't matter.

Wolf: But that's what they told them.

Daly: No, the Planning Board told them, conceptually maybe it was O.K, but there may be issues down the road, "such as legal" which would need to be complied with.

Wolf: So, one of the problems here is they just didn't follow the zoning regulations that were already on the books in the State of New York.

Daly: They didn't follow the law, but that's what happens when you don't have counsel at all your meetings. Remember, this is not a wealthy Town. The ZBA chair did go to the Department of

State and asked about rendering an opinion without an application and the Department said, "Well, you can look at it and you can talk about it, but you can't issue an opinion." The right procedure would have been to say, "We're not going to look at this, go put in an application, and then we'll deal with it." But you have to remember, outside of Sleepy Hollow, who sits on these boards, right? So maybe we need to clone Don Stever and Nick Robinson and send them out, and we'll end up with better decisions. But, those kinds of mistakes are made regularly because zoning law is really complex.

Stever: I have a question, and it requires a premise first. The premise is that there is precedent for building and operating construction and debris landfills over sole-source aquifers, and that premise is Long Island. There's a special part of the ECL that just deals with Long Island landfills. I have a client who has a large clean fill. It has a double liner and a leachate collection system to protect the aquifer. Now, if the operator in your case had been smart, he would have come in and said, "I will follow the Long Island landfill guidelines to build over your aquifer, to protect your aquifer." Would the town still have tried to close him down?

Daly: I'm going to guess - Probably. One of the issues that was before the adjudicatory hearing was the issue of the liner. And the applicant held firm to its position that the landfill was not over the aquifer. And so maybe he was playing the wrong cards. Whether or not it would have gone the other way if he would have said, "I can protect your aquifer," there are still issues of the number of trucks that would be coming into town and a general distrust of what was going to go into that landfill.

Turner: So he wasn't proposing that there be an engineered liner of any kind?

Daly: Well, it has to be lined, but the quality of the liner . . . I don't know that we've ever really found a liner that I would put over my drinking water.

Turner: I thought the 360 rules for construction and debris landfills didn't require him to use a liner at the time he submitted his application.

Daly: No, it did.

Turner: My question is. . .

Stever: You need a single liner unless you're in Long Island.

Turner(resuming question): The only aspect of the new zoning ordinance that you discuss in the paper says, "No new solid waste part 360 facilities, except those owned or operated by the Town." What was the logic of that? Was there a claim involving that in the lawsuit?

Daly: No, not at all. The lawsuit was simply about a technical violation of notice.

Robinson: I think that part 360 was to regulate private landfills and municipal landfills separately under the state solid waste plan. In fact, in the mid-80s, for the first time, the State closed down all unlicensed municipal landfills. Town supervisors in this are were very upset; they didn't have a place to take their garbage anymore. It's interesting that the State has totally un-funded the Mine Land Reclamation Act that Phil Weinberg and I were active in getting going years ago. And, DOH has never been funded adequately since the late 60s. So you have a classic example of a very poor, under funded community with no economic development prospects suddenly finding itself at the edge of other economic activity. The State could care less about this area, and if the local governments don't have the capacity to manage their systems, nobody's going to do it for them.

Brown: I am a practitioner. I've gone before planning boards, basically in rural New York State, for a long time. It is my observation that the laws is sometimes followed, sometimes it isn't. There is no particular correlation, and, in fact, most recently in Westchester County, which is not a rural county, I had an instance in which, on the face of the matter, in which I represented a client. An environmental impact statement was required and the Board asked their attorney, who was a former chairman of the Environmental Section of the New York State Bar Association, if I was right and he said, "no." He was dead wrong and I was right. So there you are.

Daniel Mandelker and Kathryn Plunkett

The authors began to realize that there were local governments that had there own system of environmental review, rather than state systems. They looked at environmental impact review statutes, starting with NEPA, as the genesis of environmental impact review (EIR). Then they looked at SEPAs in New York, California and Washington. They then looked at the process and procedures required under SEPAs and looked at planning proce-

dures in those states as well as authority for local governments to enact EIR statutes. Finally, they looked at the integration of the environmental review process with comprehensive planning.

In New York, SEQRA requires an Environmental Assessment Form (EAF) to determine if there is a positive, (the project have major environmental impacts) or negative (the project will not have major environmental impacts) declaration, as an initial study to see if further EIR is required. If there is a positive declaration then an EIR must be created. This review is a performed on a project-by-project basis. The New York statute requires substantive mitigation of environmental harm.

In California, CEQA, which is similar to New York's SEQRA, also requires an initial study. If there is a positive declaration, then impact review is needed. In California, there is a limited substantive requirement; they do not have to mitigate, only respond.

Washington requires an environmental checklist, an initial study, and then a negative or positive declaration is issued. If there is a positive declaration, then an EIS is needed.

All of these requirements must be fulfilled by local agencies (planning agencies) at the local level. This process is cumbersome and time-consuming because each time a project is proposed an EIR must be done. In relation to this problem the authors analyzed how planning efforts in these states differ.

In New York, comprehensive planning is optional, but zoning must be in accordance with a comprehensive plan if one is adopted. Most localities do adopt comprehensive plans. New York localities have already begun integration through the use of generic environmental impact statements, which are essentially a broader and more conceptual EIS for planning.

In California, local comprehensive plans are required. Comprehensive plans must have a conservation element, so there is an environmental ethic at the planning stage. California attempts to streamline environmental review through master environmental impact reports (MEIR), which are more comprehensive studies based on a plan or a large multi-staged project. If environmental impacts are already addressed and mitigated in the MEIR, and a subsequent project comes along with impacts already addressed in the MEIR, there is no longer a need for further environmental review at that stage. MEIRs thus limit the need for subsequent review.

Washington has a growth management act (GMA). If an action is already addressed in a comprehensive plan then it is called a "planned action" and requires only limited environmental review. If a comprehensive plan has anticipated the project, substantive review is limited.

The paper also addresses local governments' authority to use EIR. The strict statutory construction requirement of Dillon's Rule is no longer a limiting factor in many states. Local governments that do not get authority through SEPAs may be able to get such authority under home rule or other enabling legislation.

Finally, the authors considered Chapter 12 of the APA's Growing Smart Model Legislation, which looks at the streamlining and integration of planning and environmental review with a focus on three methods of integration. These methods are:

- 1) Analysis of alternatives in comprehensive plans;
- 2) Environmental program statements on comprehensive plans similar to MEIRs; or
- 3) Addressing environmental regulations in comprehensive plan or development regulations with a focus on a streamlining process.

Comments:

Mandelker: Where state law is applied at the local level, the need for local law is not as great. Emphasis here is on localities in states that don't have those kinds of statutes. There are only four out or five states where statewide EIR applies at the local level, and in these states there is really no good argument for supplemental local authority. So, in general we looked at 3 categories:

1. States that have an EIR system that does not apply at local level, so there is a reason to supplement at the local level;
2. States that have an EIR system and it does apply at local level, but local government still wants to supplement it; and,
3. Those states that have no EIR at all, such as South Carolina, and the local governments want to get involved

Turner: How many states still have Dillon's rule?

Mandelker: A number have repealed it, and some think it is no longer present in the majority of states. And, if you look at home rule, I think you can see home rule as basically a rejection of Dillon's Rule. Add to that the fact that some states have legislation that has expressly repealed it by statute, or, for example, states

such as New Jersey that have put it in their constitution that they no longer have Dillon's Rule.

Cannon: Were you able to draw any conclusions about impact of EIR, and I'm thinking, for example, has NEPA made any difference at the federal level? Do you have any sense of how seriously these impact studies are taken?

Plunkett: I spoke with planners. Planners I talked to seem to take EIR very seriously. So it does seem to make a difference at the planning stage. Planners are trying to make initial studies as complete as possible. How do you make these studies comprehensive enough?

Nolon: Here is a dramatic example of how EIR could be used to save developers money and promote watershed planning. The practice in New York is to make every developer in a watershed do an environmental impact study as if that project were the only one in the area. The cost, per project ranges from \$200 thousand to \$1 million. The environmental review law permits agencies to do Generic Environmental Impact studies, and they can be done intermunicipally. So, imagine 14 communities in an intermunicipal watershed doing an environmental impact study on their shared watershed and then using that study when any developer proposes building in the study area. State law allows the agencies to charge developers for their pro-rata share of the broader study and limits project studies to issues not examined in the generic. Under this law, there is funding for watershed planning, indirectly, and less expense for developers: a win-win approach. Unfortunately, this provision is seldom utilized.

Salkin: Of course the real problem is you can only mitigate, you can't stop a bad project because local zoning allows that type of project to go in. Unless you do a GEIS with new zoning. And, the locality has to pay attention and understand how much "build out" is allowed under the zoning. I think a lot of communities would be shocked if they realized how much build out their current zoning allows. So, does environmental review make a difference? From the point of view of mitigation, it does make a difference, but if it's a bad project and the zoning allows it, all you have is mitigation, you can't stop the project. So you must go back to land development controls to ensure that such bad projects don't occur.

Mandelker: In Mt. Pleasant, South Carolina the developer can't go ahead until an EIS is approved. Beyond the procedures there

are the substantive issues. If they turn you down you have to go back and do it all over again.

Callies: In Hawaii the EIS is an information-only document; you can't stop a project based on what the EIS discloses, you can only say that a developer did not look at certain issues. And this is the majority of the states—this is the federal rule. It doesn't prevent unconscionable blunders; they just have to acknowledge them. In Washington though, there's a case that says government can stop a project based on the content of the EIS and nothing more. Are there any other state cases like this?

Mandelker: In California, you must have good mitigation, or they can stop you. New York and California are a bit on the edge on that approach. Really, I guess, the issue not addressed in our paper is: can a local government make its environmental review substantive if state environmental review is not substantive.

Robinson: I can think of an interesting case study—the use of NEPA for the Golden Gate Recreation Area which was a conversion of a military base, the Presidio, to a national park area with a mixed use public/private component. There were no federal, state, or city laws that governed how that massive part of San Francisco would be converted. And both the National Park Service and the Department of the Interior used NEPA and NEPA processes and EIS to craft or, if you will, mediate a process for that. I think the difficulty with knowing if these laws work or not is the case law, which is focused on procedure, and no one goes back and does empirical analysis. This is one of the few well-documented bits of empirical analysis. I find it interesting that only New York and California have come up to the line and adopted these statutes and other states haven't. I think the Western states, which have largely public lands, use NEPA as a surrogate law. *Robertson v. Methow Valley Citizens Council* is a land use planning case of a major economic development project that would normally be considered a local government's jurisdiction, except for the fact that the local government did not have authority over it and NEPA was used. I think those states have not chosen to get into the process because of the Feds, to the extent its there, have the process. The question is, how do you tier EISs, and that's totally unexamined. We make no use of tiering state and federal databases; no coordination of the databases and we don't even know the private consulting firms that do this as a business have their own private databases of all this info and sell the same data over and over

again, but at very low cost to themselves and at very great profit for themselves. And the public is sitting around and pretending that this is all new info being compiled for this site-specific development. So I think there are a number of things you are going to look at using the EIA process in this way that deserves some scrutiny and I am very pleased that you have programmatic and generic EISs in your paper, because that to me is the potential of this. If you can do your generic analysis before you launch the development then you can tier on to that development project and—Don Stever and I are trying to do that in the reverse. As you know, under the federal cellular laws, the FCC grants all the rights to have cell towers everywhere. As demand for cellular use grows you have to have more of these facilities and we are finding that competition amongst competitors means you have to have more and more people coming in asking for more and more cellular facilities in more and more places, sometimes on the same monopole, but not always. They want them everywhere. Every little corner has to have a facility. And rather than having five different competing companies appear for maybe 20 different sites in a small village - that is a total of maybe 60 applications we'll have in the next 10 years. We are about to launch a generic EIA, to say where you plan for them, how they should go in, how aesthetically would you conceal them, so you don't have a large group of monopoles and arrays in your community. That is not contemplated at all in the federal, state or local legislation we have for cellular; but SEQRA allows it to happen, and if a local government doesn't do that it will be chewed up in the course of repeated applications, which don't have planning components at all. I think generic and programmatic EISs have got to be made more effective.

Mandelker: They have done some good work on the program approach in California and Washington, but sometimes it's difficult. You get problems at that point on the planning side. You don't know what development is going to look like at the planning stage, and you get to the site-specific side when it's too late. What they have been able to do creatively in some communities is say: "We have looked at environmental issues in the program statement, we can sort them all out, but the big issue is traffic at the site so we are going to reserve that until we've settled everything else." And then when they get the site-specific application they cut it way down and can concentrate on what they have to look at.

Weinberg: My concern in looking at all of this is using a programmatic makes a lot of sense, but when you throw the machine into reverse and try to use planning as a substitute for EIA then you run the risk that you're not going to consider some of the impacts because they were not part of the planning process and someone is going to say, "Oh yeah, we forgot about traffic or noise," when it wasn't part of the planning process to begin with. So I think the machine works only in one direction.

Plunkett: Well they do have a subsequent review. If you have a program EIS or planned action you still have a review process that goes on at the project level with initial study and the environmental checklist is still done to ensure that impacts have been already addressed. So if there are subsequent impacts, such as traffic, that need to be addressed at that point, then they still go through review at that stage.

Weinberg: In a state with SEQRA sure, but in half of the states or more that don't have it, and states that don't apply SEQRA to local planning at all, there is a limit to the value of using planning as a substitute for SEQRA. We may just be putting too much on the back of planning.

Mandelker: We are not suggesting doing that. We talked about the option of bringing environmental issues into the plan—the plan would not be a substitute for environmental review. About 18 states adopted little NEPAs after NEPA was adopted, but the movement stalled. In our other options in our tiered system, which we developed in Chapter 12—if you don't consider something up front, you have to consider it later on and that's clear.

Turner: Has the California Legislature enacted any, "reforms" of its statutes since the Commission came out criticizing the process for involving lengthy delays?

Mandelker: What commission is that, the most recent one?

Turner: Yes, the most recent one.

Mandelker: They are constantly tinkering with CEQA, and I don't think there have been major reforms recently, not since in the last four or five years. But they're certainly concerned about it. And let me say, the Californians told me CEQA is more important in land development than the land use and planning processes.

Plunkett: I found that repeatedly throughout the articles, that CEQA forms the basis of the planning element there. There is

this environmental overview already in the plan. All right, are there any more questions? No? O.K., thank you.

Panel 4: Friday April 19, 2002, 1:15-3:00 p.m.

Michael Allan Wolf, David Callies

Michael Allan Wolf

Professor Wolf suggests that there is a brooding omnipresence over local environmental law – regulatory takings. The question has yet to be answered as to how local governments will fare in the courts when challenges are brought to new environmental controls.

Recent court appointments at the federal level have strongly favored property rights and the current political agenda appears to be to strike down as many regulations as possible under the guise of property rights. Confessing that he is a “true Federalist” at heart, he acknowledges that the environmental law system in the U.S. is bad; but it is the best there is.

The main thrust of his presentation is that local officials engaged in regulation are not going about it the right way because they run the risk of being hauled into court.

Professor Wolf pointed out the importance of timing in the leading environmental takings decisions. For example, had the statute that was determined to create a regulatory taking in *Lucas* been passed after Hurricane Hugo (and not one year before), the statute might well have contained language and provisions that would have enabled it to withstand the takings challenge. Furthermore, any regulation that has a negative impact on a company's profits could also potentially be challenged as a taking since money could be viewed as property.

The main point of Professor Wolf's presentation and article is that local governments need to earn deference. Since *Euclid v. Ambler Realty*, local governments have been acting in a “Euclidean zone of comfort.” This is a legitimate zone of operation. However, he suggests that local governments may be acting outside of that zone when they enact environmental regulations, and that there is a rich history of negative decisions concerning local environmental regulations. Toward building deference for local governmental regulation of the environment, Professor Wolf makes three major recommendations:

- 1) "Pay as you go." Local and state governments should look closely at conservation easements and bond issues to raise money to pay for environmental protection rather than place the burden entirely on landowners. If a locality is attempting to pay for protection as well as regulate, the courts may be more deferential.
- 2) "Get back into uniformity." Replicate what happened in 1926 when the court upheld local zoning in *Euclid*. Bring real estate and environmental experts together.
- 3) "Stop to think locally." When a local government is about to enact a new environmental regulation, then officials should solicit public comment, circulate documents for review, and engage the community in the decision making process.

Comments:

Nolon: In California and Washington where environmental reviews are streamlined, do you find that the courts are more deferential?

Wolf: I think that the major focus of the EIR procedure in those states is on the effect on the environment. It's not the effect on private property rights. I'm suggesting that more emphasis - I said rights again, it's living in Virginia. They're getting to me. It's in the water. There's less of an emphasis on the impact on private property values. I suspect very strongly that when you do that kind of investigation, it will reveal that in most cases, private property owners are not being marginalized, prejudiced. You know there's no discrimination against them. But on occasion, you'll find a private property owner who's really being targeted in a negative way by local government. When Jane was doing her presentation, I was thinking, until she turned the tape recorder off, wait a minute, I was thinking, here's a local government that comes up with an ordinance, an environmental ordinance, because someone made a proposal? I tell my students that that's a due process violation. Many of the cases in our land use casebooks which private property owners win are cases just like that where a land owner was doing something consistent with the zoning ordinance and then wants to do something else, and the local government finds out about it and changes their zoning laws. That's the famous floating zoning case from Pennsylvania. I mean those were good cases, those are really good cases. Because sometimes local governments don't plan ahead and then somebody who is just acting in a legitimate fashion is penalized and so this process

might weed those cases out from the run of the mill local environmental regulations. And what would then happen, I would hope, is that local government realizes that they really are discriminating against the landowner and maybe they should change their procedures or create an exception or variance.

Been: I think part of the problem with property takings impact analysis is that they tend to be like, many EIS's, they tend to be very rubber-stamped. You know, "we've thought about this, there are no takings here, there's no impact." So one thing is we really need to give guidance to local governments about how we really do want these. I can't say as I've ever seen one that's really good. So we need to make that model available.

Wolf: Right. And I might agree with you. To be honest with you, maybe it's just going through the process that satisfied a court that that's been done.

Been: I have my doubts that you could get one through Scalia without him noticing that it's just a *pro forma* sort of thing. But the other thing is, I think, it would be really important in teaching people the model that they ought to be looking for, would be to think about, in the takings impact analysis, what kinds of goodies that this developer has gotten that could be considered offsets for this impact.

Wolf: Yes, exactly.

Been: And one of the ways in which we really fail is that we haven't pushed that average reciprocity of advantage notion nearly enough, and when you say it in the abstract, Justices like Scalia blanche, right, but if we had worked on it gradually to get that concept through, I think we'd be a lot further.

Wolf: Yes, that's very good. Yes, that's true. I mean I can't say I read *Penn Central* when it came out; I was in grad school at the time. But the first time I really read it, I knew who Penn Central was and I thought the nerve of this company that was bailed out by the federal government and to come back and say that their private property rights had been taken. Of course, it was a good argument - it almost worked. They were a few justices away from winning, so. But, your point is, I think your point is that if this kind of analysis had been done in that case, then all of these factors would have been raised, the factors that Judge Breitel had mentioned.

Been: But, to tie back to what I was saying about what's happening with NAFTA, one of the most dangerous things about the *Methanex* case is that here you have a situation where the federal government orders the states, you know, change your regulations to allow, to require MTBE to be put in your gasoline, so this market for MTBE was completely created by the federal government and the state government. And then suddenly when the state government withdraws it, OH! We've taken your property rights. Well, you didn't have those until we created them.

Wolf: Right.

Been: But that's totally what. . .

Wolf: That's the *Oilton* case. That's *Washington Legal Foundation v. Phillips*; it's the same situation. But. . .

Nolon: That same enigma is in the *Lucas* case, too. The local government adopts zoning that permits development on the beach. The state, under the federal Coastal Zone Management Program, adopts a Beachfront Management Act and it's coastal council draws a setback line in the sand proscribing development within 1000' of the high water line. It was that action that was found to totally take Lucas's economic value. As it turns out, development on the beach couldn't happen, in most cases, without the affirmative help of both state and federal agencies. Under FEMA, buyers of new beach homes can get water damage insurance and, under a state required insurance risk pool, they can get wind damage insurance. Most home buyers, without such insurance, could not get a mortgage to buy a beach house and, it turns out, the private sector is to risk-adverse to provide wind and water insurance for those who buy homes on barrier island beaches. So, what the federal and state agencies took away by regulation was only possible under federal and state programs. This shows again the price we pay for not having a framework understanding to coordinate among levels and agencies of government. Curiously, the state of South Carolina provided no hardship exemption in the Beachfront Management for which Lucas could apply: a very curious omission. After the set-back regulation was held to be a taking and the state ordered to buy the property from Lucas, they amended the law, inserted a hardship exemption, took title, gave themselves an exemption, and sold the property for more than they paid.

Wolf: Yeah, but you know what, what Vicky. . .

Nolon: And we have a hardship way out.

Wolf: Right.

Nolon: Very few regulations are *per se* takings. Most courts will defer to legislation that accomplishes serious objectives such as the achievement of TMDL objectives when that legislation conforms to the local master plan and has hardship exemptions to prevent total takings. This may not prevent all development in the watersheds of federally impaired waters, but it can cut down nonpoint source pollution considerably, and do it without great public cost.

Wolf: Right, but as you're saying that, I'm thinking *Palazzolo*, I'm thinking comprehensive plan is there. Everybody has notice of it, what's to stop all these landowners from not bringing a takings claim even though they knew about the regulation. I mean I do think that if you add the numbers of the Justices up, the situation that I just described, I think that they would apply the notice rule. But, technically, even now, I mean right now; no one is foreclosed from bringing a takings claim for any regulation that I can think of. At least bringing the claim, surviving a Rule 11 if you're in federal court and then intimidating local government into settling. That's a dangerous situation.

Turner: This four-element proposal you had for the promulgation of a regulation or I suppose the enactment of an ordinance.

Wolf: Right. Right.

Turner: What would be the standard that you would advocate for judicial review? You know, if you look at state cost benefit analysis in the early nineties, a lot of industry groups were saying "oh, we need CBA." And what has happened is that a lot of the state environmental agency analysis is, unless they can piggyback on to something EPA has done.

Wolf: Well I can't suggest an answer because the Supreme Court has supplied the answer to your question. And that would be that there has to be a substantial relation to a legitimate governmental interest. They've already heightened the scrutiny. The land owner who is frustrated by this new procedure, does the procedure, they determine there's not a substantial, not a dramatic impact on her private property values is going to bring a takings claim and according to *Nollan*, then the standard is going to be substantial relation to a legitimate governmental interest. I think that there are two. Charles Haar and I just finished an article about takings. It's called "*Euclid* Lives." I hope you enjoy it.

We're talking about what to do next and Charles wants to go in this direction. He wants to say what is a substantial relation and I think I may have articulated one way of making this a, making out a claim for substantial relation. The direction I want to go in is a completely different one because I just read a book for a course I teach to law students and historians about, and history students, about the Rehnquist Court and it was talking about the regulatory takings movement and the author made the point that the regulatory takings clause is much more effective than the due process clause for achieving the agenda of conservatives because it's solely an economic right clause. And the first time I read it, I thought that's really very clever. Then I thought about Charles Reich's "new property" concept. What about a property right to a scenic view? Now, I can bring a takings claim. If you want to open up the takings clause, let's open it up all the way. I will bring a takings claim when a local government acts in such a way as to deprive me of the right to my scenic view, of my right to environmental enjoyment. Think about all of the other things that will be protected. How about my property right to an abortion? I can envision a time, twenty years from now, when the takings clause will be used the same way as the due process clause. You make your bed, you have to lie in it. You start reading the takings clause expansively, you're opening yourself up to a lot of potential problems.

Turner: But it sounds like you're not foreseeing the ability of litigants to bring facial challenges to the takings analysis, do you think it's going to be as applied.

Wolf: I think so, yeah. I think so. And that facial, after *Pallazo*, and some of these other cases, the facial/as applied distinctions are fading away. I saw something the other day that I didn't know. Dan, you might remember this, but in the lower court challenge in *Euclid* itself, it was an as applied challenge, and if you read Metzemaum, James Metzemaum, what he says about this, he got really upset because in the oral argument, Newton Baker turned it from as applied to on its face. But the lower court opinion was an as applied and a lot of people, a lot of shall I call them anti-environmentalists, I don't know. A lot of people on the regulated industry side, they consistently point to *Euclid* and say well, *Euclid*'s different, because *Euclid* was on its face, but technically, if you read the lower court opinion, it was an as applied challenge.

Malone: I wanted to come back to John's comment which is do you think that whatever notice is required, do you think that the land use plan, the comprehensive land use plan, would be seen as having the level of specificity?

Wolf: I think it would depend on the jurisdiction. Some of them do have a lot of specificity. Especially the ones that are combined with maps and they can be quite specific. The aspirational ones like New York City 67 Plan, no, that does not give you enough notice. I mean, in those aspirational plans, they actually talk about solving the nations ills through building up the inner city and things like that. But modern comprehensive plans do tend to be more specific than their predecessors.

Malone: Sufficiently detailed to withstand. . .

Wolf: Right.

Been: I think the other area your comments suggest we need to work on is in building alliances between the national environmental movement and local governments. It's shocking how the national environmental groups often don't think that they have any stake in these takings challenges brought against local governments. As you say, it's all going to fall like a house of cards at the local government level.

Wolf: Yeah, we were talking about how it seems like in the environmental journals and so forth, they reacted to *Nollan* and *Dolan* so slowly, I mean they don't see a connection and there's a real connection. And we haven't seen the CERCLA case, but after *Eastern Enterprises*, I've been waiting for that CERCLA challenge, the retroactivity of CERCLA and so forth. But there's a real risk, one more vote should do it.

Mandelker: Your comment about better and more sophisticated fact-finding ties in with the notion, which still hasn't been decided, I think, after *Dolan*, of heightened scrutiny. Of course, that was an exaction case.

Wolf: Right.

Mandelker: And I think the fact is, Rick Arten has written an article if *Dolan* works in which he said it's great. This means they won't have to do their homework. When will they do their homework? So, but, that was a first prong *Atkins* case. That wasn't an economics side so it raises some interesting questions in here. About whether we want to start traveling that route. We wrote an article, remember, about essentially the same thing.

Wolf: Yes, yes.

Mandelker: And the suggestion there was room for heightened scrutiny and it raises that issue, I think.

Wolf: Right, and I will say that I do know the article and that I wrote this article not because I think it's the right way to go, but because I was under duress. I don't think it's necessarily the right direction to go. I think in our system, and am a "true Federalist," we should have a little more respect for localities. In my article, I cite Stanford Law Review article by Bill Buzzbee and Robert Shapiro, both at Emery. In this article they really talk about legislative record review, and the fact that Bill is an environmental law professor informs the piece. This is part of a whole project by the Court that involves the Commerce Clause, Section 5 of the 14th Amendment, the 11th Amendment, probably soon the 10th Amendment. They are using anything they can to put the onus on the regulator, including Congress. If they're putting this onus on Congress, *a priori*, it's going to be placed on states and localities. The difference is that I come to this position under duress, but I don't endorse it. I think it's necessary, but I would prefer that we weren't at this point.

Turner: I just want to point that the CERCLA retroactivity issue is percolating up in the Alcan Aluminum with the Superfund litigation.

Wolf: It's been killed a couple of times. Now we have a new one.

Turner: They dispensed with it. The state of Texas is assisting the groups on that issue.

Robinson: What about they, going back to what John was talking about this morning, if you recast, if the local government chooses to make a finding to recast its ordinances in light of the traditional police power, they say abatement of the nuisance, and make you the real case that there's a nuisance here, which is hard to rebut since the local government holds all the cards when makes the findings, if they do their homework well, they create a factual record, they commission studies, how do you see that being picked apart?

Wolf: Well, that protects you from one prong of *Agins*. That protects you from the total takings branch. That's how nuisance protects you. This other one, which is not really takings, it's substantive due process. This other clause, anything goes and I'm not sure that just calling it a nuisance is going to protect you from

that prong. Scalia made a concession in the text of *Lucas*, where he said change circumstances or new knowledge can make what was not a nuisance back in the late, back in the 1790's, a nuisance today.

Robinson: You're basically saying another prong is needed then. That what you've got to do is take a look at who's exercising the stewardship over natural resources that are shared by or owned by the public entity and justified by a property right or entitlement basis as well as a nuisance. And I suppose we could take the whole question that you get under SEQRA for instance of having a stewardship obligation for these commons, where the EAI law has given that authority to the local governments, may be tweak that into a property right.

Wolf: Yeah, that's the fun part.

David Callies

Professor Callies explains that there has been a change in historic circumstances that has changed his view since he coauthored "The Quiet Revolution." He noted that he was born in Chicago, but since he has spent time in California and Hawaii he has become disabused of the notion that developers don't need protection. He observes that it may take as many as 10 to 15 years to ever put a shovel in the ground once you begin the development permitting process. His presentation suggests that, although certain state regulation of development may be appropriate, most development decisions are best handled at the local level.

Professor Callies described the land use regulatory scheme on the island of Oahu. As early as 1969, the Hawaiian Islands had a perception that development would be spread onto agricultural land and enacted a state land use law. The law divided the land into urban, agricultural, rural, and conservation districts. Less than 4% was designated as urban. Thirty years later, the islands still have development in roughly the same places. The land use law has worked to a certain extent. There are, however, areas in which it is not working well.

Where it is not working is where the state interferes in local affairs in which they have no business. Law was set up to say where the state does and does not want urban development. For environmental reasons, they did not want to settle for only agricultural, rural and urban; they wanted to add a conservation district. (There really are no more sugar cane and few pineapple

plantations.) The state Land Use Commission has begun to insist on detailed review of development proposals, but the counties decide on land development. Professor Callies suggests that this arrangement has become very problematic. He urges that land use decisions need to be made at the local level. Although some decisions are regional in nature, there is a need to keep regional or statewide agencies in their proper place.

With regard to the takings issue, Hawaii has a takings problem like no other state. Where 48% of the land can't be developed, you have a total takings issue unless you can show the presence of some nuisance.

Comments:

Salkin: Can you comment a little bit more how many of these potentially changing dynamics and the way they can impact or not on affordable housing?

Callies: Well, that's an interesting issue. Hawaii is a lousy place to talk about affordable housing because there are no jurisdictions that can exclude. I mean it's an island, you can't get all upset about the fact that folks can't afford to live in Kuhala. I can't afford to live in Kuhala. This is an area, a very ritzy area, right next to a country club and near the beach. And there is no jurisdiction that excludes on the basis of race or ethnicity, it's purely economic. I guess you could say, if we're not careful, all the poor folks will live on Molokai. It's an island that used to be, unfortunately the so-called, in other times, leper colony. And that is highly unlikely to occur, so in the context of Hawaii, as my friends from Down Under say, No worries, mate. It's not going to happen. But it is certainly true that if one gave a jurisdiction the right to set up open space zones or agricultural zones that were "stealth" for open space or conservation, it's very difficult to build low or moderate-income housing under those circumstances. I'm one of the characters, who still think that the only way we're going to solve the housing crisis, is through public housing however badly it has worked in some areas, like St. Louis where Dan Mandelker is from. I have tried to do the math and I cannot find enough set asides to make it work in a meaningful fashion in a place like Hawaii where we are falling short by thousands of units a year. And when we tried, and we tried, we had a housing set aside system that would make you all either really proud or really frightened. At one point the Land Use Commission, once again, was setting up a 55% housing set aside for affordable housing. In case you are

wondering what does happen when that happens, it happened. The land developing, housing, industry in the state simply shut down. There wasn't a developer that could possibly afford to set 55 % of the housing in the affordable range and still make enough money to bother. Five major development corporations left the state. We went from 15 to 2 in 14 years. And no one has yet come back. So you want to drive that industry out of your state, set the set aside really high and you'll find that even in Hawaii, where it's hard to jump the ocean to another jurisdiction, eventually they will leave it. So then you're left with who is going to build any housing at all. I have never seen the point of, or seen a good defense of, why there has to be housing exaction on residential housing. I can understand how it would be on all the untouchables in Hawaii, like hotels and workers they would have to provide housing for (Industry, commercial), but will someone please tell me how it is that a middle class housing development drives the need for low income housing? That's a clearly definable government interest, but government ought to be providing it. If it's so important to all of us, they should raise our taxes and pay for it.

Nolon: Could you review for us briefly your article on the Florida Statutes?

Callies: Well, Florida came aground on concurrency as near as I could tell. It was a great idea: we should only permit any more development in a community or in an area, provided, if and only if, the infrastructure is in place- water, sewer, and so forth. So then we got in a chicken and egg issue, as I understand it in Florida. Who's going to blink first? No permits without infrastructure, can't pay for the infrastructure without permits for the housing. Either the government's going to pay for it all, which in Florida would bankrupt anybody, or the developer's landowner is going to front it and hope that a permit is forth coming or find the money to front it and wait for several years before the money comes into play. We have now proven I think state wide, in that state, that that does not work. I think the old ELMS Law had a lot of positive aspects; developments of regional impact and areas of critical state concern get extra scrutiny. I think the process was flawed, but the idea was excellent. And that probably should have worked. You cannot over-regulate at the state level. The state is qualified by dint of its budget, by dint of where it is in terms of the physical place, the state capital, and by dint of its interests to plan or provide a macro solution, if you will, a macro view. We need to

preserve agriculture as long as agriculture is viable in certain areas. There's a takings problem after certainly *Lucas*, but not insolvable. There are certain things we need to conserve, and hopefully most of that is public land, but that is an appropriate decision to make, again if you can get over a takings issue. Certainly it should be up to the state to decide where intense development, where development generally will go. If it is a small state, maybe where intense development should go. But to make the decision on a project-by-project basis is to me extremely flawed policy. And that's got to be left, not even to a regional agency, but to a local agency and I think Florida also proved that regional agencies don't work very well either, except with respect to large regional resources like water basins.

Mandelker: Well, in Hawaii as David points out, the LUC has gotten itself into these local matters, partly again, he might explain, but the statute there is very open ended and it got challenged years ago on a delegation of power issue because the it was so open ended, but that got lost. Now in Oregon, they delegated the Urban Growth property idea, which I personally like, some people don't like it.

Callies: It's a great idea.

Mandelker: In Oregon they delegated that function to local governments. And that turned out to be kind of a mistake because the governments were too small to take the regional factors into account. In the Portland area, they set up a regional agency to take care of this, and you know, I did an article on this a couple of years ago went into this whole Oregon system in great length. And it's very complicated, but in fact, if you look at it, they have been looking in metro Portland at the regional factors and not at the local factors. It's very interesting, what happened was it had become kind of an overlay district almost and the problem was that the local governments were not able to respond to that overlay in ways that they had to, particularly inside the urban growth boundary. They had been able to develop the densities they needed and other kinds of urban forms, which raises some other issues. Washington has handled this problem by giving the counties the urban growth boundaries responsibilities, but they're so huge. There are probably counties big enough to serve almost as quasi-regions, but it seems to me with urban growth boundaries that you can't really give that, David, to the local level, because that really is a regional decision. That's why in the smart growth

legislation; they've asked for urban growth boundaries to be done on a regional basis to take this into account. That's going to be very difficult to do, so we are again left with in kind of a quandary I think. We really haven't felt thought through some of these regional growth strategies thoroughly enough, as what's regional, what's state and what's local. What's your comment to that?

Callies: I guess two responses. Other things being equal, I think that setting regional growth boundaries, or if you call them urban growth boundaries, is an excellent idea and that the state should either have a veto, or be the ones to do it. But note that my emphasis is on growth boundaries for urban development, not deciding whether it should be a hotel or whether it should be a single family residential area and what can conditions we are going to put on that development, whether it's for low income housing or anything else. That's a local government responsibility that is not, repeat not, a state responsibility. It's none of the state's business. The state is intrusive when it does things like that. The other factor, I suppose, the second part of the response, which I should have mentioned, is that 30 years ago there were still large cities, well, large conglomerations of government, whether they were cities or counties in Hawaii, that were still relatively incompetent with respect to planning and zoning. That's not as true anymore. I suspect, from what John tells me, that that's not as true in New York, certainly that is not true in four counties of Hawaii. So there is no basis, once that happens, for there to be a big brother, big sister watching over you saying, oh we've got to take that decision away from you because you're incompetent with respect to making land use decisions. It is sometimes true, but I think less true now, and certainly that has affected, granted, my jurisprudence and philosophy with respect to California and Hawaii and what happens every once in a while in the Ninth Circuit, which comes up with some good decisions, but also a lot of very strange ones.

Nolon: I like David's point about the difficulty, if not impossibility, of state agencies micromanaging development at the local level. Obviously, that is expensive, requires local knowledge, and is loaded with details that must be mastered if the job is to be done well. Local agencies have that knowledge and local citizens are going to pay the price of poorly done development. Why not take the funds that the state can afford to spend on supervising local development, give it to local planning agencies with some

guidelines about how they are to achieve state objectives, and let the locals do a better job with that much-needed support. Using state and federal resources to build local capacity is an important objective that hasn't been seriously advanced in the environmental and land use area.

Callies: Well, I agree a hundred percent, some what tongue in cheek, let's return to block grants. Let's bypass the states and go to, give it to the cities. Of course the state governments would never tolerate that if they can block it. But again, that's where the rubber meets the road, that's where it should happen. The cities are starving, Washington and state governments can stop telling the local governments and counties what to do without funding it, you know, saying here's what I think you ought to do, raise your taxes. Oh, by the way, local government all you have is a real property tax. Figure that out. It's never been fair. It's a big issue.

Robinson: David, there are two other models that you were involved in thirty years ago, I wonder if you have reactions on how they've evolved. One is of course the Adirondack Park Agency, which tried to create a process of giving power to the local governments once they showed their competence. Get your zoning in place and then recapture from the Park Agency power. But of course most, it was years before most of those local governments felt they wanted to even get into the business, they tried to set fire to the building and everything else, the Park Agency was in. The other, of course, was Vermont and it's Act 250 approach, which is more deferential to local governments and then in contrast to that, when Governor Rockefeller tried to do the same thing in the Hudson Valley and create a Hudson Valley Commission that would come in and hold state hears and decide how things should be for the region, we virtually had the kind of property owners revolution that had taken place in the Valley two hundred years before, and they were run out of the valley. Now we have this consensual, as John describe it, grassroots process of building compacts and agreements amongst municipalities to try and rebuild a sense of that. But in each case, those three examples, tried to work with local government in some way and I wonder if you have reflections on the evolution.

Callies: Well, the Adirondack has always been *sui generis*, at least in my mind. You know there is that tremendous interconnection, or overlaying and intertwining of public and private

rights. I don't have the figures effects, but the public owned 45% or 55% and private owners owned the other percentage, and it wasn't just right down the middle, it was all over the place. Under those circumstances, I think you can make a good case for a super agency in an area as large as that, particularly since as you point out, the municipalities involved really had virtually no planning and land use competence; they didn't what any, as opposed to the Hudson Valley, where there are an awful lot of well developed communities, whether or not they were interested in controlling growth is another matter, but then you're imposing something pretty much after all the horses run out of the barn, from a local standpoint and that would not make as much sense to me. I like the Vermont model, I no longer have a feel for how successful it is. But it made a lot of sense. I thought a super-commission plus a lot of local environmental boards, to control, to have an affect on that which state government for all the people in the state has an interest, as in the Adirondack Park Agency, where lots of people from the state, I gather from the metropolitan region come and visit, that's important. As opposed to California, where sometimes I think they want the whole state to be a park, as soon as you got your house in it. The elitism in California at all levels of California residents is surprising to the point of shocking. We want the regulations as soon as we're there, but before we're there, we think you ought to let us in. It's an interesting, interesting situation. I know that many of you think I speaking harshly, and you probably have friends in California, trust me I know. It is outrageous. And the disease is to some extent spreading to Hawaii where our largest island was wonderfully, folks talked things over and decided what needs to be done. And then we got a mayor who was really more pro-development than some folks wanted, but most folks were happy with him and then some environmentalists moved in from Oahu to Hawaii and now everything is up for grabs, in the island, which probably has the most potential for low-income housing, moderate income housing, tourist development. It's huge; it has more land area that all the rest of the islands combined. It's where we should have put our capital, but it ended up for other reasons being on Oahu and it would have made a huge amount of sense had we done so and now we can't, between burial rights and whole range of other customary rights, and the activism that brings with it. We're having huge problems in that county in terms of taking and putting development where it arguably ought to go. Unless of course, you all, as the rest of the

United States would like to compensate all of us hugely and just turn Hawaii into a national park and endangered species preserve. Which if I may, in this last parting shot, if the ESA works in Hawaii the way it works in the rest of the United States, the takings issues are going to be incredible. Just as I was leaving in the last month, the Fish and Wildlife Service is holding hearings on designating 25% of the island of the Kauai as natural habitat and 45% of another island, which is not as heavily occupied. Try that for size among the landowners and residents. They're furious. Try that for size under protecting endangered species under Section 9 and what is a taking. I predict the next case is going to come out of Hawaii and it's going to be a dandy. If that's the case that gets to the US Supreme Court, trust me, the ESA is in deep, deep trouble because it is the worst factual situation imaginable for supporters of the ESA. It will look outrageous on a map, it will look hugely intrusive on anything remotely resembling private property rights, however defined, Michael. By the way, I'm getting frightened because you and I are agreeing more and more. I might not agree with how you get there, but I sure agree with your solutions. Thank you.

Panel 5: Friday April 19, 2002, 3:00-4:00 p.m.
Jonathon Cannon, James McElfish

Jonathon Cannon

My role is a summary role and I also want to talk about local environmental law from a federal perspective. I ask you to think about the subject of local environmental law in a different way than most have so far: Think about it in terms of state and federal regimes that operate at the same time. That is, think about it in a more centralized areas of environmental law that some of us are more familiar with. I come up with three basic categories:

- 1) Where it functions parallel to the law of the state or federal government in the environmental arena. Example where have local wetlands law at same time as state wetlands law and presumably a federal wetland law.
- 2) Gap filling – local environmental law doing something that neither state nor federal law does. For example, protecting scenic areas, critical environmental areas, aesthetic values, farmland etc. There is no federal statute that protects areas for aesthetic value.

- 3) "Supplemental Local Environmental Law" – all the federal statutes are designed to achieve certain results nationwide and designed more specifically to achieve certain environmental goals nationwide. They posit national goals and come forward with regulatory regime to achieve those goals.

The trick is that the machinery of these environmental laws is not adequate, by itself, to achieve goals whether because of a lack of legal authority, lack of resources or administrative capacity, or lack of political will or resources. Those limitations mean that the federal government can't get there without help – specifically it cannot achieve these national goals without relying on the exercise of authorities and bringing forward resources at the local level. For example, TMDLs.

The major remaining problem in water quality in the US is non-point pollution. We've already talked about the fact that EPA doesn't have the regulatory authority over non-point source discharges under the CWA. Therefore, if it's going to get anywhere it's got to engage the states or more likely local jurisdictions that have some land use authorities which could be brought to bear to achieve some progress. ESA under the take provision, section 9, the federal government has the legal ability to stop people from taking endangered species including altering habitat, but they don't have the resources to police all the property owners. Just because it has authority doesn't mean it will bring actions against local land use authorities. In each of these instances there is a national goal, and limiting ability on part of federal government to achieve it. An obvious role for local government with its particular set of resources and authorities to allow the achievement of those goals - how do we engage local governments to complete the picture.

My thought is that you are not going to get an enlargement of federal legal authority (i.e., not going accrue additional coercive capacity, nor more funding). Therefore, have a collaborative effort. The effort might look like the Chesapeake Bay program which is a collaborative program in which states have reached an agreement, not legally binding, but every state has agreed to exercise its land use authorities to protect the bay. The U.S. is a party to that agreement but only a party – it has no power to that agreement that puts it above the other parties. It brings assistance to the table, but so does everyone else.

Accountability and Enforceability:

If you have accountability, it is different than command and control structure. The accountability is really political accountability. In other words, the parties agree on an environmental goal, agree on steps and way to reach that goal, and ways to measure progress along the way and get the information to the public. People who care about the place, create goals and obtain data then ask why they haven't been met. The limitation on this is that collaboration takes a long time and in some cases it just doesn't work – e.g. if you can't bring the interest of the parties into alignment and the agreement is on a voluntary basis you won't get an agreement. So you will probably end up with a pretty uneven result. Therefore, you must tolerate some degree of uniformity and along with that the notion that you won't get to the national goal in every place but will in some – and perhaps in the most appropriate areas. Things work best where people in the area support the national goals.

Comments:

Weinberg: In general, I agree with your approach but a lot has happened that has moved us forward in the land use and environmental area because there was something in the statutes that allowed citizens to sue. The collaborative approach is only as good as the good faith of the politicians at each level of government.

Callies: Those hard structures have moved us a long way, but I think we are reaching the limits of what that structure can provide. And at those limits, additional increments of progress are going to have to be through a more collaborative associative set of approaches.

Wolf: What you are offering is a paradigm that works until the next emergency. We don't have watershed protection because we don't have a huge problem. (Example of federal takeover of airports after 9/11).

Callies: A point that needs to be reiterated is the buying of credibility. Where some of the problems have arisen is when an environmental agency has gone outside its box in attempting to accomplish something which was never meant to be accomplished. In Hawaii that is stopping all development – that is not what the ESA was meant to do. There is no question as to the landowners mind that it is being used to stop all development for all time. Once that mindset goes, credibility is gone.

Malone: Isn't there only one model of environmental funding, which is that federal money goes to the state and then the state trickles it down to the local government. States end up with the bulk of money, and local governments with the bulk of the burden.

Callies: I would be in favor of giving feds more flexibility to make deals with local governments.

Turner: I can think of some examples of states that are particularly inept in administering EPA delegated authorized programs, but I can also hypothesize metropolitan areas in those states where county level governments could come together to get money from feds and use it.

James McElfish

I'm going to try to synthesize some of the things we've discussed over the last two days with an eye towards identifying three issues we need to pay particular attention to. The first issue is the *mismatch* between the geographic jurisdiction of local governments and the scope and scale of the problem or resource to be addressed. This comes up repeatedly in water quality and biodiversity issues; affordable housing and sewers are examples also. The spatial mismatch issue has been with us since the standard zoning act and we've tried many solutions. One thing tried early was extraterritorial zoning (an innovation used in the Midwest). Other approaches were first easy annexation, and then we tried no annexation. The next generation was the metropolitan regional planning district, and then the "Quiet Revolution" laws, such as the state growth management laws we discussed. Directing public funding where we want development to go represents another generation. Urban service boundaries define where services will be provided and where they will not; although development is not prohibited. Urban growth boundaries (Oregon) and priority growth areas (as in Maryland define where development should go and where it should not. Intermunicipal or regional authorities or special intermunicipal districts are another way to attack the spatial mismatch. So are intermunicipal compacts, where local jurisdictions keep their own zoning and planning boards and make deals on how to address development and environmental issues. The proposal at this conference for a "commission of [local] commissions" is recognition that even if we rely on local governments, we need at least informal cooperation to realize our objectives that cross geographic boundaries. Similarly,

state experiments with cross-acceptance of municipal plans (as in New Jersey), is another version of the quiet revolution where we want to compel jurisdictions to take neighboring plans into consideration when making their own plans. Tax base sharing is another response that affects development patterns, addressing the problem of benefits and burdens crossing municipal geographic boundaries.

It seems to me that there are three research tasks related to this spatial mismatch problem if we are to have effective local environmental law:

1. What tools and structures haven't we tried? Are there some new experiments?
2. Are there any ways to match the vehicle to the problem? For example, are some structures particularly good for nonpoint source pollution control and some good for biodiversity protection?
3. Are there ways to pursue networking without formal structures or compacts?

The second issue area is the *information* needed by local governments to undertake this task of local environmental law. This falls into two areas: (1) the technical expertise and capacity of local governments to obtain expertise and use it, and (2) the provision of environmental information.

Strategies for improving information and effectiveness include strategies like that of the Land Use Law Center to teach and train as many people as can. Another approach is to *require* local governments to meet these goals – which will require them to acquire expertise. For example, a state environmental impact report (EIR) law drives local governments to do EIRs which means they'll have to hire technical capacity to do so. Or set up a system of state goals that must be met and accomplished – again this will drive expertise, but the mandate doesn't say exactly how you have to do it. A third way is that the state requires this and hands out the model - i.e., state writes model laws and lets local governments choose, as in Washington State. The fourth is incentives: special funding to jurisdictions that engage in seeking and using quality environmental information. Open space funding and availability of recreational funding contingent on certain acts of local governments.

As for basic environmental information – most local jurisdictions don't have the capacity to engage in several hundred thousand dollar studies of water quality and biodiversity studies every

time they prepare an ordinance. Most states don't have a lot of funding either. But in the areas of water quality, biodiversity and green infrastructure, there seems to be a role that the federal government and states could and should take on and provide consistent technical information to local governments. Monitoring, for example, is often not available to support the TMDL program by identifying impaired waters. State budgets are being cut for monitoring – which is the first thing to go. The same thing is happening at the federal level. How are local governments going to get the baseline information they need and how are they going to know if they have made any progress unless someone is providing continuity?

On the biodiversity side, a number of states have filled this need. Massachusetts has a “BioMap” and is using state Natural Heritage information to tell municipalities where they should and should not do certain things. But it's not a “hard map” so it doesn't prohibit any town from granting permits for building or zoning within those areas. It is a basis for decision-making. Having access to information on the status and requirements of environmental issues is very important.

The third point is *accountability*: it is important to get beyond simply determining what tools we have, and determine if we are getting anything done. EPA in an attempt to give deference to states and localities has moved away from this – in the Phase II stormwater regulations, it specifically discourages any monitoring as to whether water quality is getting any better, but only measures whether best management practices are adopted. This is backwards, because we should say what is required and demand monitoring to determine if those goals are being met. You need to know if you are meeting the goals you have set. Citizen suits too could be important for providing for accountability. John Cannon has spoken to a number of these accountability issues.

No Comments