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John R. Nolon

Elisabeth Haub School of Law at Pace University

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IN PRAISE OF PAROCHIALISM: THE ADVENT OF LOCAL ENVIRONMENTAL LAW

*John R. Nolon**

I. INTRODUCTION

National environmental policy emphasizes the central role of the federal government as the standard-setter and steward of a healthy environment. This focus on the responsibility of the national government and its various and uneven collaborations with the states has all but obscured the role of local governments in environmental protection.¹ While federal agencies have successfully reduced pollution that emanates from "point sources," such as smoke stacks and water pipes, most environmental damage today is caused by "nonpoint source" pollution resulting from land uses that are the legal responsibility of municipal governments.² Federal attempts to influence local regulatory prerogatives have been thwarted by a variety of legal, political, and practical obstacles.

Meanwhile, there has been a remarkable and unnoticed trend among local governments to adopt laws that protect natural resources. These local environmental laws take on a number of forms. They include local comprehensive plans expressing environmental values, zoning districts created to protect watershed areas, environmental standards contained in subdivision and site plan regulations, and stand-alone environmental laws adopted to protect particular natural resources such as ridgelines, wetlands, floodplains, stream banks, existing vegetative cover, and forests. The purposes of these laws are to preserve natural resources from the adverse impacts of land development and to control nonpoint source pollution. In inventing these controls, local governments have creatively used a variety of traditional and modern powers that their state legislatures have delegated to them.

This powerful trend at the grassroots level of environmental policy-making presents an opportunity to revisit the national approach to environmental protection and to create a more integrated system that incorporates the historical function of local governments in protecting the public from the perils of pollution and environmental degradation.

* Professor of Law and Director of the Land Use Law Center, Pace University School of Law; Adjunct Professor, Yale School of Forestry and Environmental Studies. I would like to thank Kristen Kelley for her invaluable research assistance.

¹ By local government, municipal government, locality, or municipality, this Article means any incorporated city, town, village, borough, county, or other governmental entity smaller than a state that has been delegated authority to regulate the use of land in the public interest.

² See *infra* note 23 and accompanying text.

This Article explains the role that local governments have assumed in protecting the environment, explores the means by which they have obtained their authority to do so, and discusses how this enhanced municipal role should influence environmental and land use policy at the federal and state level. Part II reviews federal efforts to control nonpoint source pollution, and identifies the constraints on federal action. Among these constraints is the national understanding that the power to control the private use of land is a state prerogative, one that has been delegated, in most states, to local governments. Part III describes how the traditional authority of localities to control land use has evolved to incorporate environmental protection standards, and how local land use agencies apply and enforce those standards. In Part IV, the various methods that state legislatures and courts have used to delegate and expand the authority of local governments to protect the environment are explored, explained, and analyzed. This Part demonstrates that the importance of controlling environmental degradation at the local level has led states to expand the range of matters that may be regulated under traditional land use authority, home rule powers, and special purpose statutes. Part V summarizes empirical research regarding local environmental laws and provides detailed illustrations of the various types of protections that municipalities have adopted. Part VI makes the case that local governments, despite their much-lamented limitations, should be full partners of the state and federal governments in the critical matter of environmental protection. Part VII argues that the advent of local environmental law is a natural and healthy response of the legal system to environmental exigencies, precipitated in part by the inertia experienced at the federal level, and that it is time to change federal and state policy to reinforce and utilize this powerful new grass-roots force.

II. FEDERAL EFFORTS TO CONTROL NONPOINT SOURCE POLLUTION

While local governments have been working to adopt laws of their own invention to control nonpoint source pollution, federal agencies, working toward the same objective, have attempted to influence local land use decisions using a variety of strategies. This is particularly evident in the efforts of the Environmental Protection Agency ("EPA") to control air and water pollution. Early attempts by EPA to reduce air pollution by intervening in local development matters were recognized as a threat to the power of the states to control land use, secured by the Tenth Amendment.³ These attempts were met with amendments to the Clean

³ The Tenth Amendment provides as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

Air Act in 1977 that expressly prohibited federal requirements aimed directly at land use control.⁴

The 1977 Clean Air Act Amendments were not an isolated example of the reluctance of the federal government to interfere with the plenary land use authority of the states. At the inception of the era of federal activism in environmental protection, Senator Henry Jackson proposed the adoption of a National Land Use Planning Act as a bookend to the National Environmental Policy Act, to integrate federal, state, regional, and local land use planning. This federal land use act was narrowly defeated in the House of Representatives in 1974, in part because it was regarded as an assault on the independent authority of the states to control land use.⁵ More recently, the efforts of the Army Corps of Engineers to prevent the construction of a landfill by a consortium of municipalities in the Chicago area were struck down by the U.S. Supreme Court. In *Solid Waste Agency of Northern Cook County v. United States Corps of Engineers*,⁶ the Court held that the Army Corps lacked jurisdiction under the Clean Water Act to regulate development in intrastate, non-navigable waters solely on the basis of the presence of migratory birds.⁷ The jurisdictional limits of federal agencies to protect the environment, resting in part on the Interstate Commerce Clause of the federal Constitution, were at issue in this case. Such jurisdictional limits, of course, do not constrain state governments or their localities in regulating wetland disturbances or other private land uses.

These jurisdictional, constitutional, and political obstacles have redirected federal energies from regulating land use to influencing state land use regulation. The Clean Water Act provides states with federal funds to encourage land use planning to prevent nonpoint source pollution.⁸ State and local governments are encouraged under the federal Coastal Zone Management Act to adopt plans to preserve coastal areas.⁹ Federal finan-

⁴ See 42 U.S.C. § 7431 (1994) (stating that “[n]othing in this chapter constitutes an infringement on the existing authority of counties and cities to plan or control land use, and nothing in this chapter provides or transfers authority over such land use”).

⁵ See John R. Nolon, *National Land Use Planning: Revisiting Senator Jackson’s 1970 Policy Act*, LAND USE L. & ZONING DIG., May 1996, at 5.

⁶ 531 U.S. 159 (2001).

⁷ *Id.* at 171.

⁸ 33 U.S.C. § 1281(g)(1) (1994).

⁹ The Act provides grants to coastal states to develop management programs for their coastal zones. 16 U.S.C. §§ 1451–1465 (1994). State programs must meet several requirements, including providing for management of land uses having a significant impact on coastal waters and making a clear statement of which agencies and officials are to take action to implement the program. See Linda A. Malone, *The Coastal Zone Management Act and The Takings Clause in the 1990’s: Making The Case for Federal Land Use to Preserve Coastal Areas*, 62 U. COLO. L. REV. 711, 727 (1991) (stating that “[if] the requirements for state programs were more specific, the CZMA could come close to the most controversial form of land control—federal land control. The passage of the CZMA was possible because the Act required state programs to implement federal policy rather than federal regulations.”).

cial aid is denied for developments in sensitive coastal areas under the Coastal Barrier Resources Act.¹⁰ The modification of habitats that may harm endangered species is prohibited under the Endangered Species Act ("ESA") unless the modification is allowed by a permit issued pursuant to an approved habitat conservation plan.¹¹

Similar efforts to influence state and local action are evident in federal transportation policies. Regional transportation planning must conform to State Implementation Plans that meet national ambient air quality standards under the Clean Air Act.¹² Federal funding can be denied to any development project that does not conform to the State Implementation Plan.¹³ A tepid attempt is made under this scheme to conform federal transportation planning to local land use planning, recognizing that land use planning is done, in most states, at the local rather than the regional level.¹⁴ The federal Transportation Equity Act for the 21st Century provides regional transportation planning agencies with the authority to fund projects that reduce traffic congestion and to acquire scenic easements and create bicycle trails.¹⁵ It also provides tax breaks for employers who subsidize employees' use of mass transit.

These are but a few of many federal actions that are aimed at stemming air and water pollution, but that recognize that the direct power to regulate land use for such purposes is not within the legal authority of federal agencies. These efforts are nonetheless a heroic effort on the part

¹⁰ 16 U.S.C. § 3501 (1994 & Supp. V 1999).

¹¹ 16 U.S.C. § 1539 (1994). The ESA is an example of a federal environmental law that pursues objectives other than the prevention of nonpoint source pollution and illustrates how federally prescribed standards and procedures may interfere with the prerogatives of local governments to control land use. Under the ESA, landowners and developers may prepare Habitat Conservation Plans ("HCPs") that fully describe proposed land development activities and demonstrate measures that will mitigate their adverse impact on endangered or threatened species. *Id.* § 1539(a)(2)(A). An approved HCP is a prerequisite for the issuance of a permit for land development activities that result in an incidental taking of a protected species. *Id.* § 1539(a). This regulatory regime is based on the ESA's ban on taking of endangered species by any person subject to the jurisdiction of the United States. *Id.* § 1538(a)(1). "Persons" subject to the Act include private citizens and entities such as local governments and officials. *Id.* § 1532(13). The process of preparing and reviewing an HCP is somewhat redundant of local requirements contained in site plan or subdivision regulations that require developers to prepare detailed development plans and submit them to local administrative agencies for review and approval.

¹² 42 U.S.C. § 7506(i) (1994).

¹³ *Env'tl. Def. Fund v. EPA*, 167 F.3d 641, 644 (D.C. Cir. 1999).

¹⁴ Under the Intermodal Surface Transportation Efficiency Act, regional transportation planning agencies known as Metropolitan Planning Organizations ("MPOs") must develop long- and short-term transportation plans that consider "the likely effect of transportation policy decisions on land use and development and the consistency of transportation plans and programs with the provisions of all applicable short and long-term land use and development plans." 23 U.S.C. § 134(f)(4) (1994). The enigma embodied in this requirement is easily described: it requires regional transportation agencies to achieve consistency with land use plans that are predominantly local in nature and not consistent with one another at the regional level.

¹⁵ Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998).

of the federal government to reach down to the local level and directly influence the effects that land use has on air and water quality and on natural resources.

A manifestation of this struggle is seen in the recent EPA proposal to delay a Clean Water Act rule that revises the federal impaired waters program.¹⁶ The Total Maximum Daily Load ("TMDL") program established under section 303(d) of the Clean Water Act requires states to identify and list waters not meeting federally established water quality standards. States are required to allocate the quantities of particular pollutants among the sources that discharge into impaired waters, to ensure that pollutants do not exceed federal standards, and to provide reasonable assurances to EPA that their allocations will be enforced. On July 16, 2001, EPA filed its proposal in the U.S. Court of Appeals for the District of Columbia to delay by eighteen months the effective date of its final rule under the TMDL program.¹⁷

The acronyms and technical vocabulary should not mask the simple reality of the TMDL program: the pollutants it regulates emanate largely from development projects and land uses that are regulated by local and state agencies. The type of nonpoint source pollution of water affected by the TMDL program includes the runoff from impervious surfaces such as roofs, driveways, parking lots, and roads; erosion and sedimentation caused by development activities, including the removal of vegetation and site disturbance; and the movement into water bodies of fertilizer, pesticides, and herbicides from lawns, golf courses, and farms. While federal authority to regulate point source discharges from air stacks, effluent pipes, and other discernable, discrete conveyances has been established, federal power to regulate nonpoint source pollution is far from clear, in part because of the independent authority of state governments to regulate the land uses that cause such pollution.¹⁸

It is interesting to ask what recourse EPA has, assuming its authority to enforce TMDL standards, if a state refuses to cooperate or fails to do an adequate job of preventing the nonpoint source pollution of waters that are designated as impaired under the TMDL program.¹⁹ Hypotheti-

¹⁶ Susan Bruninga, *EPA Moves to Delay Action on TMDL Rule; Rule Changes May Be Proposed in Spring*, 32 ENV'T REP. (BNA) 1415 (2001).

¹⁷ See *id.* at 1415.

¹⁸ The Tenth Circuit Court of Appeals held that the Clean Water Act does not give EPA the authority to regulate nonpoint source pollution. *American Wildlands v. Browner*, 260 F.3d 1192, 1198 (10th Cir. 2001); see also *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976) (stating that "Congress consciously distinguished between point source and nonpoint source discharges, giving EPA authority under the [Clean Water] Act to regulate only the former."). The *American Wildlands* case made it clear, however, that the TMDL Program established under 33 U.S.C. § 1313 requires states to "assure that there shall be achieved . . . cost-effective and reasonable best management practices for nonpoint source control." *American Wildlands*, 260 F.3d at 1198 (quoting 40 C.F.R. § 131.112(a)(2)).

¹⁹ The circuitous route traveled by EPA to influence local land use regulation under the

cally, EPA could assume the state's role, classify its waters, and issue, condition, or deny permits for proposed land uses under a pollution prevention system of federal design. Because of the cost and controversy involved in making EPA responsible for the regulation of nonpoint source pollution, this threat may be illusory. There are, however, precedents for this type of EPA preemptive strike and penalties within EPA's control for state noncompliance, such as withholding discretionary funding or denying point source permit applications that would further degrade impaired waters.

Assuming that states wish to comply with the TMDL program, classify their waters as required, and establish allocation systems for the loading of pollutants within each water source, how is the program to be implemented? To act effectively, the states inevitably must require their local governments to amend their land use controls to meet TMDL standards or preempt local authority to the extent necessary to meet those standards through more direct state action. Simply stating this proposition reveals the depth of the problem.

Nearly all states maintain the power to preempt local land use authority in order to address matters of state concern.²⁰ Preventing poten-

TMDL program is being tracked by the National Marine Fisheries Service ("NMFS") in its attempt to protect seasonal species of Pacific Northwest Salmon listed as threatened under the ESA. Under § 4(d) of the Act, NMFS has issued regulations requiring states and municipalities to adopt protective regulations. NMFS issued these regulations under authority of 16 U.S.C. § 1533 (1994). Since local governments in northwest states regulate and permit land use activities in watersheds that contain salmon habitat, localities that fail to adopt protective standards can be said to have neglected their duties under the ESA. *See supra* note 9. An emerging legal theory posits that local governments are liable for third party developer and landowner actions that endanger protected species. This is implicit in the NMFS rules that grant immunity from such liability for local governments that adopt regulations to protect salmon and for third parties acting under approved local regulations. In *Loggerhead Turtle v. County Council*, 148 F.3d 1231 (11th Cir. 1998), the Eleventh Circuit held that an environmental plaintiff had standing to challenge a Florida county for failing to regulate beachfront lighting when that lighting was shown to be the proximate cause of the disorientation and death of turtle hatchlings in their attempt to return to the sea. This injury to a protected species was found to be "fairly traceable" to the actions of the county. *Id.* at 1249. On remand, it was found that the county's regulations did not cause the taking of an ESA-protected species. *Loggerhead Turtle v. County Council*, 92 F.Supp. 2d 1296 (M.D. Fla. 2000). This specific holding, however, did not negate the general principle of the circuit court's decision that local governments may be liable for third party actions taken under their regulations.

²⁰ *See, e.g.,* *Wambat Realty Corp. v. New York*, 362 N.E.2d 581 (N.Y. 1977). The power of the state-created Adirondack Park Agency to preempt local zoning and planning authority was upheld because the "future of a cherished regional park is a matter of state concern." *Id.* at 582 (punctuation omitted). The court wrote, "Of course, the Agency Act prevents localities within the Adirondack Park from freely exercising their zoning and planning powers. That indeed is its purpose and effect, not because the motive is to impair home rule, but because the motive is to serve a supervening State concern transcending local interests." *Id.* at 584. The court added that "to categorize as a matter of purely local concern the future of the forests, open spaces and natural resources of the vast Adirondack Park region would doubtless offend aesthetics, ecological, and conservation principles." *Id.* at 582.

tially hazardous water quality degradation surely constitutes such a concern. Neither this need nor a state's authority to act, however, will necessarily overcome the historic reluctance of states to disturb the authority of local governments to control land use. For thirty years, articulate voices have been suggesting the reform of state land use laws to address the multiple problems caused by the parochial nature of local land use control.²¹ These shortcomings include the exclusionary effects of local land use standards, the adverse environmental impacts of locally sanctioned sprawl, and local resistance to regional planning. Despite these shortcomings, only a few states have preempted local land use prerogatives or seriously directed local decision-making.²²

The importance of being able to influence land uses at the local level to achieve federal environmental goals is clear. Nonpoint source pollution is the cause of nearly half of the remaining water quality problems in the United States²³ and is intimately related to land use.²⁴ Perhaps the

²¹ See Michael Allan Wolf, *The Prescience and Centrality of Euclid v. Ambler*, in ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 252, 253 (Charles M. Haar & Jerold S. Kayden eds., 1989) (specifying the problems identified in *Euclid* of assigning control over land use to local governments as "exclusion, anti-competitiveness, parochialism, and aestheticism"). A report entitled "The Quiet Revolution," prepared for the Council on Environmental Quality in 1971, contained a powerful statement of the problems with local land use control: "This country is in the midst of a revolution in the way we regulate land The *ancien regime* being overthrown is the feudal system under which the entire pattern of land development has been controlled by thousands of individual local governments, each seeking to maximize its tax base and minimize its social problems, and caring less what happens to all the others." FRED BOSSELMAN & DAVID CALLIES, COUNCIL ON ENVTL. QUALITY, *THE QUIET REVOLUTION IN LAND USE CONTROL* 1 (1972). To these must be added the propensity of local governments, most of which rely heavily on local property taxes, to favor economic development over environmental protection. See PAUL E. PETERSON, *THE PRICE OF FEDERALISM* 36-37, 69-75 (1995).

²² After analyzing recent state planning and smart growth legislation, Robert H. Freilich concludes, "One of the major problems discussed in earlier chapters—that of parochialism—is not solved by any of the provisions discussed The nation's land use problems and the states' failure to reclaim some of their authority delegated early on to localities in the land use field points to the need for efficient and comprehensive planning at the state level." ROBERT H. FREILICH, *FROM SPRAWL TO SMART GROWTH* 240 (1999).

²³ Joe Cannon, *Choices and Institutions in Watershed Management*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 379, 388 (2000).

²⁴ See James C. Buresh, *State and Federal Land Use Regulation: An Application to Groundwater and Nonpoint Source Pollution Control*, 95 YALE L.J. 1433, 1433 (1986); see also Chuck Sulfin, *Protecting Our Water Resources Through Better Development Practices*, NONPOINT SOURCE NEWS-NOTES, Jan. 2002, at 1. The U.S. Supreme Court recently discussed the connection between land use and nonpoint source pollution in its opinion in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, No. 00-1167, 2002 WL 654431 (U.S. Apr. 23, 2002):

Impervious coverage—such as asphalt, concrete, buildings, and even packed dirt—prevents precipitation from being absorbed by the soil. Instead, the water is gathered and concentrated by such coverage. Larger amounts of water flowing off a driveway or a roof have more erosive force than scattered raindrops falling over a dispersed area—especially one covered with indigenous vegetation, which softens the impact of the raindrops themselves.

recent advent of local environmental law is an acknowledgment of this importance, and suggests a strategic solution to the problem of imposing federal environmental solutions on local and state land use decision-making. The gradual appearance of local natural resource protection laws is evidence that states are giving local governments authority in this area and that local political leaders have chosen to exercise that authority. Some localities have begun to understand the benefits of regulating land uses on a watershed basis by creating zoning districts or overlay zones the borders of which follow the topographical boundaries of critical watersheds.²⁵ There are even examples of local planning that integrate watershed and transportation corridor planning.²⁶ When local governments begin to think in these strategic ways, it leads to cooperation across municipal lines, since the movement of water and motor vehicles follows regional, rather than local, patterns.

The realization that federal environmental policy must deal with private land use at the local level is not new. When lobbying on behalf of the National Land Use Planning Act in the early 1970s, the chairman of the Council on Environmental Quality, Russel Train, testified that land use was "the single most important element affecting the quality of our environment which remains substantially unaddressed as a matter of national policy."²⁷ The tension involved in the implementation of the TMDL program, however, indicates that the dilemma of realizing federal environmental objectives in light of state power under the Tenth Amendment is a persistent one.

III. THE ADVENT OF LOCAL ENVIRONMENTAL LAW

Over the past few years, local governments throughout the country have adopted an impressive number of local environmental laws.²⁸ These include a variety of novel ordinances designed to protect discrete natural resources such as trees, stands of timber, hillsides, viewsheds, ridgelines, streambeds, wetlands, watersheds, aquifers, water bodies, and even wildlife habitats. At the same time, provisions designed specifically to protect environmental features from the impacts of development have been added to fundamental land use documents such as comprehensive plans and zoning ordinances. Traditional land use regulations such as those gov-

Id. at *3 (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F.Supp.2d 1226, 1231 (D.Nev. 1999)).

²⁵ See *infra* notes 143–148 and accompanying text.

²⁶ See Routes 202/35/6 Bear Mountain Parkway Sustainable Development Study (Nov. 27, 2000), available at http://www.202and6.com/report_summaries/Outreach_Visioning_Summary.pdf (on file with the Harvard Environmental Law Review).

²⁷ Henry L. Diamond, *Land Use: Environmental Orphan*, ENVTL. FORUM, Jan.-Feb. 1993, at 31, 32.

²⁸ John R. Nolon & Kristen Kelley, *Local Environmental Law: Natural Evolution or a Mutant Form?*, 12 ENVTL. L. IN N.Y. 173, 191 (2001).

erning subdivisions, cluster developments, and site plans are being amended with environmental protection in mind. There is something new in these laws that regulate the private use of the land in the interest of environmental conservation that bears examination.

It is widely understood that local governments have been given a key, if not the principal, role in land use regulation.²⁹ Zoning is the foundational device in this field. Local governments may adopt zoning ordinances and maps and thereby provide for the future development of their communities. Comprehensive zoning began as a mechanism for protecting public health and safety by separating incompatible land uses from one another. In its application, zoning became design-oriented, focusing on the layout of streets and highways, the location of public buildings, the ability of fire trucks and firefighters to reach and fight fires, the size and bulk requirements that protect property values, and the infrastructure connections that create a workable community.³⁰

Subdivision and site plan regulations emerged to complement zoning and help localities implement their physical plans. Such regulations initially concentrated on the creation of safe intersections; the fluid movement of vehicles; the adequacy of road width, curbs, and sidewalks; the siting of buildings; and the prevention of off-site impacts such as flooding. In *Golden v. Ramapo*, the leading state court case sustaining local growth management ordinances, New York's highest court referred to subdivision control as a mechanism "to guide community development in the directions outlined here, while at the same time encouraging the provision of adequate facilities for the housing, distribution, comfort and

²⁹ "Land use regulation in the United States traditionally has been the province of local governments using zoning ordinances and building codes as their principal regulatory tools." ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 768 (3d ed. 2000). See also ZYGMUNT J. B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 1164 (2d ed. 1998) (writing that "[i]n day-to-day practice, the overwhelming majority of land-use management occurs at the local level, predominately through local government regulation").

³⁰ After citing expert reports to sustain the constitutionality of zoning, the U.S. Supreme Court's decision in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), stated:

These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to raise children, etc.

Id. at 394.

Despite the Court's focus on these limited purposes of early zoning, several of its strongest advocates thought that zoning should and could be used to achieve purer environmental objectives. See Earl Finbar Murphy, *Euclid and the Environment*, in ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP, *supra* note 21, at 154, 168-74.

convenience of local residents.”³¹ At their inception, regulatory tools such as subdivision and site plan regulation were not designed to protect natural resources from degradation.³²

Communities have long used large-lot zoning as a crude way of protecting open space and its associated natural resources.³³ Upzoning occurred in some suburban areas, aimed principally at lowering development densities to control population growth, maintain residential property values, and contain the cost of servicing development while, incidentally, limiting water use, preventing aquifer contamination, and containing nonpoint source pollution.³⁴ As the environmental movement evolved and matured in the 1970s and 1980s, the sensitivity of local lawmakers was raised and early signs of the adoption of local environmental law became apparent. These signs emerged from a variety of sources, including the National Flood Insurance Program, which required local governments to adopt and enforce floodplain management programs as a prerequisite to local eligibility for national flood disaster assistance payments.³⁵ Catastrophes influenced the movement towards increased regulation at the local level, leading to storm water management measures and stringent setback requirements along the coasts of barrier islands that are particularly vulnerable to hurricane damage.³⁶ The 1990s saw the advent of local laws clearly designed to protect environmental functions and these, in the aggregate, now constitute a significant body of law.

Despite the existence of these laws, law school casebooks in both environmental law and land use law indicate that neither field has incorporated “local environmental law.” The role of local governments is only briefly mentioned in environmental law casebooks.³⁷ When the books

³¹ *Golden v. Planning Bd.*, 285 N.E.2d 291, 298 (N.Y. 1972).

³² “Land use law, zoning, and subdivision controls typically are not concerned with environmental degradation; their purposes are to regulate the timing and sequence of development to minimize costs to the community and to avoid conflicting uses.” THOMAS J. SCHOENBAUM & RONALD H. ROSENBERG, *ENVIRONMENTAL POLICY LAW* 379 (3d ed. 1996).

³³ *See Senior v. Zoning Comm’n*, 153 A.2d 415 (Conn. 1959); *see also Simon v. Town of Needham*, 42 N.E.2d 516 (Mass. 1942).

³⁴ In 1976, the Model Land Development Code adopted by the American Law Institute recognized the capacity of local planning and zoning to protect critical environmental areas and natural resources at the local level: “A development ordinance may designate special preservation districts of historical, archaeological, scientific, architectural, natural, or scenic significance” MODEL LAND DEV. CODE § 2-209 (1975). “A Local Land Development Plan shall be based on all the following studies . . . (f) geological, ecological, and other physical factors that would be affected by development.” *Id.* § 3-103. The Code was prepared as a new model for state legislatures to adopt to update the Standard Planning and Zoning Enabling Acts of the 1920s. It was not entirely adopted anywhere. Article 7 of the Model Code contains provisions allowing states to regulate local zoning decisions concerning developments of regional significance and areas of critical state concern. *Id.* §§ 7-301, 7-201.

³⁵ 44 C.F.R. § 60 (2000); *see also* 42 U.S.C. §§ 4011, 4013 (1994).

³⁶ *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

³⁷ Several environmental law casebooks contain sections that recognize in a limited

refer to localities, it is almost always in the context of their devolved authority under federal statutes such as the Clean Water Act, the Coastal Zone Management Act, the Wild and Scenic Rivers legislation, and the Endangered Species Act.³⁸ Conceptually, the role of local government is seen as that of an incidental participant in a federal system of environmental law. There is much more to local environmental law than meets the eye when approached from this top-down perspective. A few land use casebooks cover local laws aimed at environmental protection, but their coverage is limited largely to one or more of the following topics: floodplain regulation, storm water management, wetlands ordinances, agricultural zoning, or large-lot zoning.³⁹ Even these topics are covered most

sense the nexus between local land use control and environmental protection. *See* PERCIVAL ET AL., *supra* note 29, at 759 (containing a chapter entitled "Land Use Regulation and Regulatory Takings" which generally outlines the role of state and local land use regulation, recognizes its relationship to environmental protection, and explores how regulatory taking challenges limit the exercise of state and local land use authority); SCHOENBAUM & ROSENBERG, *supra* note 32, at 379–94 (discussing local planning, zoning, and subdivision regulations, focusing on the shortcomings of local governmental decision-making and the trend toward the reclamation of land use regulatory authority by the states); PLATER ET AL., *supra* note 29, at 1137 (observing in a chapter entitled "Land Use-Based Environmental Protection Statutes" that Americans fail to see a link between land-use regulation and environmental protection.)

³⁸ Several environmental law casebooks mention the role of local governments in environmental law in this oblique sense. *See, e.g.*, ELIZABETH GLASS GELTMAN, *MODERN ENVIRONMENTAL LAW: POLICY AND PRACTICE* 486 (1997) (discussing the federal Superfund Program and the financial burden it can place on local governments); *ENVIRONMENTAL LAW: FROM RESOURCES TO RECOVERY* 326 (Celia Campbell-Mohn ed., 1993) (including a brief discussion of environmental law at the local level that is limited to agricultural zoning, conservation easements, and the transfer of development rights); FRANK P. GRAD & JOEL A. MINTZ, *ENVIRONMENTAL LAW* §§ 7.04–7.06 (4th ed. 2000) (containing a chapter on land use planning that discusses agricultural land preservation, growth management, and the transfer of development rights); FRED BOSSELMAN ET AL., *ENERGY, ECONOMICS AND THE ENVIRONMENT* 14 (2000) (explaining how energy companies must comply with local regulations and how local governments adopt laws to manage land development); JOHN E. BONINE & THOMAS O. MCGARITY, *THE LAW OF ENVIRONMENTAL PROTECTION* 775–79 (1992) (outlining state and local control of hazardous waste facilities); JOSEPH SAX ET AL., *LEGAL CONTROL OF WATER RESOURCES* 616–99 (1991) (containing a discussion limited to water supply and organizations at the local level); PETER S. MENNELL & RICHARD B. STEWART, *ENVIRONMENTAL LAW AND POLICY* 133–35 (1994) (discussing locally unwanted land uses in minority neighborhoods and local control of municipal waste treatment plants); ROGER FINDLEY & DANIEL FARBER, *ENVIRONMENTAL LAW* 513 (4th ed. 1995) (limiting discussion to hazardous waste facilities); WILLIAM MURRAY TABB & LINDA A. MALONE, *ENVIRONMENTAL LAW: CASES AND MATERIALS* 949–1053 (2d ed. 1997) (containing a chapter on environmental regulation of land use that discusses the evolution of state and local land use, as well as agricultural zoning and the transfer of development rights).

³⁹ CHARLES M. HAAR & MICHAEL ALLAN WOLF, *LAND-USE PLANNING: A CASEBOOK ON THE USE, MISUSE, AND RE-USE OF URBAN LAND* 702–04 (4th ed. 1989) (including a zoning ordinance from Fayette County, Kentucky, on floodplain conservation and protection, as well as a discussion on the reclamation of land use decision-making authority by the state governments from the local level); CURTIS J. BERGER, *LAND OWNERSHIP AND USE* 863–65 (3d ed. 1983) (discussing environmental issues at the local level, specifically in Sanbornton, New Hampshire, where minimum lot size requirements were adopted); DANIEL R. MANDELKER, *LAND USE LAW* § 1.06 (4th ed. 1997) (describing zoning ordinances

often as functions that are incidental to zoning, subdivision, and site plan control. Again, there is more to local environmental law as it is currently practiced than is discussed in these texts.

The gradual evolution toward environmental sensitivity in local land use controls has proceeded far enough that a distinct environmental ethic, as opposed to an incidental one, is evident. Local governments have adopted a host of environmental regulations. Local laws addressing the following issues can now be found and studied: cluster development;⁴⁰ environmentally sensitive area protection;⁴¹ erosion and sediment control;⁴² grading, excavations, and fill;⁴³ floodplain control;⁴⁴ groundwater/aquifer resource protection;⁴⁵ landscaping;⁴⁶ ridgeline protection;⁴⁷ scenic resource protection;⁴⁸ soil removal;⁴⁹ solid waste disposal;⁵⁰ stream and watercourse protection;⁵¹ steep slopes;⁵² storm water management;⁵³ timber harvesting;⁵⁴ tree

that accomplish agricultural land preservation and floodplain protection); DANIEL R. MANDELKER & JOHN M. PAYNE, *PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS* 351 (5th ed. 2001) (identifying the relationship between environmental law and land use controls in areas such as wetlands and floodplains and explaining the difficulty that local governments can experience in regulating these resources); DANIEL P. SELMI & JAMES A. KUSHNER, *LAND USE REGULATION: CASES AND MATERIALS* 113 (1999) (explaining that local governments have ignored environmental impacts in subdivision regulation and illustrating how environmental protection requirements can be accomplished using local zoning and subdivision controls); DAVID L. CALLIES ET AL., *CASES AND MATERIALS ON LAND USE* 613–14 (3d ed. 1999) (outlining various local zoning techniques that can be used to protect agricultural land and discussing moratoria on new development to protect the environment and public health, explaining that such moratoria are based on the general police power of localities, not their zoning authority); ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 904–10 (2d ed. 2000) (discussing environmental justice and difficulties in siting locally unwanted land uses); ROBERT R. WRIGHT & MORTON GITELMAN, *CASES AND MATERIALS ON LAND USE* 534, 538, 551 (5th ed. 1997) (discussing three cases dealing with environmental and land use issues at the local level: *In re Spring Valley Dev.*, 300 A.2d 736 (Me. 1973), *Sellon v. City of Manitou Springs*, 745 P.2d 229 (Colo. 1987), and *Corrigan v. City of Scottsdale*, 720 P.2d 513 (Ariz. 1986)).

⁴⁰ See *infra* notes 165–171 and accompanying text.

⁴¹ PAWLING, N.Y., CODE § 215-24 (1994) (“Environmentally Sensitive Areas”).

⁴² See *infra* notes 179–180 and accompanying text.

⁴³ BALDWIN, PA., CODE § 99 (2001), available at <http://www.generalcode.com>. This site is a database of municipal codes. Many of the ordinances cited in the Article are located here. In order to access an ordinance located at <http://www.generalcode.com>, select “E-Codes,” then select the state and the relevant town.

⁴⁴ See *infra* notes 186–190 and accompanying text.

⁴⁵ See *infra* notes 172–174 and accompanying text.

⁴⁶ WARREN COUNTY, VA., CODE ch. 180, Art. V, § 180-49.1 (1996), available at http://warrencounty.va.lgac.net/WC_Zoning_Article_V.htm.

⁴⁷ See *infra* notes 191–196 and accompanying text.

⁴⁸ See *infra* note 197 and accompanying text.

⁴⁹ See *infra* notes 179–180 and accompanying text.

⁵⁰ AKRON, N.Y., CODE § 131, art. II (2001) (“Disposal of Solid Waste”), available at <http://www.generalcode.com>.

⁵¹ See *infra* notes 220–228 and accompanying text.

⁵² See *infra* notes 198, 200 and accompanying text.

⁵³ See *infra* notes 201, 203 and accompanying text.

⁵⁴ See *infra* notes 204–205 and accompanying text.

protection;⁵⁵ vegetation removal;⁵⁶ and wetlands.⁵⁷ Interestingly, many of these ordinances deal with the prevention of nonpoint source pollution, an urgent problem that generally is conceded to be beyond the reach of federal environmental law.

These local environmental laws are implicated when developers propose projects to local administrative bodies charged with reviewing development proposals. Traditionally, local bodies such as planning boards review development proposals to determine if they comply with the provisions of zoning ordinances and subdivision and site plan regulations. These regulations are thought of as land use laws and are the province of land use lawyers and planners. The question raised by the adoption of local environmental laws is whether they are an extension of *local land use law* or whether they constitute a separate body of law known as *local environmental law*. The answer to this question has more than incidental consequences. If these emerging environmental laws are an extension of land use law, they may be seen as a supplement to a coherent system that regulates land development at the local level. If they are a new body of law, or a discrete topic within the field of environmental law, they run the risk of conflicting with local land use regimes with all the consequent inefficiencies and problems that this will involve. A technical extension of this question is whether local governments derive their authority to pass environmental protection laws from their delegated land use authority or from other provisions of state law. This latter question is discussed in the next Part of this Article.

IV. THE POWERS OF LOCAL GOVERNMENTS TO ADOPT LOCAL ENVIRONMENTAL LAWS

Local governments derive their authority to adopt laws that protect the environment from land use enabling statutes, home rule laws, and special laws directly aimed at environmental protection. This Part demonstrates this range of authority with references to statutes in Colorado, Connecticut, Georgia, New York, and North Carolina. Constitutional provisions and court decisions from California, Illinois, New York, South Dakota, and Utah are also cited. The understanding that emerges from this discussion is one of limited, uneven, but growing empowerment of local governments to adopt laws to protect their natural resources from the adverse impacts of land use.

In most states, it is understood that municipalities have no inherent powers, but can exercise only that authority expressly granted or neces-

⁵⁵ See *infra* notes 213–219 and accompanying text.

⁵⁶ NEW BERLIN, WIS., CODE § 275-54(3) (2002) (“Natural Resource Protection”), available at <http://www.newberlin.org>.

⁵⁷ See *infra* notes 220–228 and accompanying text.

sarily implied from, or incident to, the powers expressly granted by the state. Unless the language delegating the power is unambiguous or the legislature's intent to delegate certain powers is clear, doubts are generally resolved against the municipality.⁵⁸ Courts vary from state to state in how strictly they construe express delegations of power to municipalities. Some find a broader range of implied or incidental powers within the express language used; others do not. It is for this reason that the power to adopt zoning, subdivision, or site plan regulations may not be sufficient in some states to support a broad range of local environmental laws. Finding authority to adopt such laws requires a careful reading of the express language of existing statutes and an understanding of whether state courts take broad or strict approaches to interpretation.

In New York, the express authority delegated to local governments to adopt zoning regulations is contained in what is loosely called the Zoning Enabling Act. The New York statute is similar to those found in the majority of states, since most derived their approaches from the standard zoning enabling act promulgated by a federal commission in the 1920s.⁵⁹ Parallel provisions regarding the authority of New York's municipalities to adopt zoning and other land use regulations are contained in the Town, Village, and General City Laws.⁶⁰ The express words of the enabling act empower town, village, and city legislatures to regulate the height and size of buildings, the percentage of the lot to be occupied, the size of yards, the density of population, and the location and use of buildings. For these purposes, local legislatures are empowered to divide the community into districts that are best suited to carry out the purposes of the

⁵⁸ The classic statement of this view, adopted by the courts of many states, is found in JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS (1872):

It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in *express words*; second, those *necessarily or fairly implied in, or incident to*, the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied . . . All acts beyond the scope of the powers granted are void.

Id. at 101–02.

For an example of a state that broadly interprets the authority delegated to local governments, however, see *infra* note 97.

⁵⁹ An advisory commission appointed by Secretary of Commerce Herbert Hoover promulgated the Standard State Zoning Enabling Act, and this model act served as the basis for most of the state statutes enacted to delegate the authority to adopt zoning regulations to local governments. See Lea S. VanderVelde, *Local Knowledge, Legal Knowledge, and Zoning Law*, 75 IOWA L. REV. 1057, 1059 (1990). See also STANDARD STATE ZONING ENABLING ACT (U.S. Dep't of Commerce 1926), reprinted in 5 EDWARD H. ZIEGLER, JR., RATHKOFF'S THE LAW OF ZONING AND PLANNING app. A (2001).

⁶⁰ See N.Y. TOWN LAW §§ 261–263 (McKinney 1987 & Supp. 2001); N.Y. VILLAGE LAW §§ 7-700, 7-702, 7-704 (McKinney 1996); N.Y. GEN. CITY LAW §§ 20(24)–20(25) (McKinney Supp. 2001).

enabling act. These purposes include lessening congestion, promoting the general welfare, preventing overcrowding, avoiding undue concentrations of population, and facilitating the provision of supportive infrastructure. These regulations, according to the enabling act, shall be designed to encourage the most "appropriate use of the land throughout the municipality."⁶¹ The New York Court of Appeals has read this language as authorizing a municipality to adopt "provisions classifying and regulating the use of land within its borders in the interest of public health, safety and general welfare."⁶² In a sweeping endorsement of local innovation in the land use field, New York's highest court upheld a village's use of floating zoning over a vigorous dissent arguing that authority for the invention of such a technique was singularly absent from the enabling act.⁶³

Other state-delegated authority to control land use in New York is contained in parallel provisions of the Town, Village, and General City Laws that empower local legislatures to adopt subdivision and site plan regulations and provide for local administrative boards to review and approve applications to develop subdivided land or individual sites. The state legislative purpose for granting subdivision authority to local governments is to provide for the future growth and development of the community, the provision of adequate infrastructure, and the "comfort, convenience, safety, health and welfare of its population."⁶⁴ Before local administrative bodies approve subdivisions, they "shall require that the land . . . be of such character that it can be used safely for building purposes without danger to health or peril from flood, drainage or other menace to neighboring properties or to the public health, safety and welfare."⁶⁵

Site plan regulations are authorized by state law to include standards providing for proper parking, access, landscaping, location of buildings, protection of "adjacent land uses and physical features," and "any additional elements" specified by the local legislature.⁶⁶ The court in *Pomona Pointe Associates v. Incorporated Village of Pomona*⁶⁷ interpreted "any additional elements" broadly to include environmental considerations. In *Pomona*, the plaintiff owned two lots with slopes of varying steepness. The village's steep slope law required the issuance of a special permit for

⁶¹ See N.Y. TOWN LAW § 263 (McKinney 1994); N.Y. VILLAGE LAW § 7-704 (McKinney 1996).

⁶² *Wulfsohn v. Burden*, 241 N.Y. 288, 294 (1925).

⁶³ *Rodgers v. Tarrytown*, 302 N.Y. 115, 122 (1951) (holding that the "village's zoning aim being clear, the choice of methods to accomplish it lay with the [legislative] board").

⁶⁴ N.Y. TOWN LAW § 276(1) (McKinney Supp. 2001); N.Y. VILLAGE LAW § 7-728(1) (McKinney Supp. 2001); N.Y. GEN. CITY LAW § 32(1) (McKinney Supp. 2001).

⁶⁵ N.Y. TOWN LAW § 277(1) (McKinney Supp. 2001); N.Y. VILLAGE LAW § 7-730(1) (McKinney Supp. 2001); N.Y. GEN. CITY LAW § 33(1) (McKinney Supp. 2001).

⁶⁶ N.Y. TOWN LAW § 274-a(2) (McKinney Supp. 2001); N.Y. VILLAGE LAW § 7-725-a(2) (McKinney Supp. 2001); N.Y. GEN. CITY LAW § 27-a(2) (McKinney Supp. 2001).

⁶⁷ See 712 N.Y.S.2d 275 (Sup. Ct. 2000).

the disturbance of a "very steep" or "extremely steep slope" as defined in the law. The plaintiff challenged the law, arguing that it granted authority to the planning board in excess of the authority contained in the state site plan statute. The court found that consideration of steep slope criteria was within the authority delegated to the village pursuant to the site plan review statute. It held that the protection of "adjacent land uses and physical features" authorizes the adoption of regulations to protect steep slopes.⁶⁸ Such provisions "are directly related to the possible impact that disturbance of very/extremely steep slopes could have on water runoff and the stable cohesive integrity of the soil, rocks, trees and vegetation on such slopes."⁶⁹ The court thought that it was clear that site plan review can include consideration of natural resource protection, especially when adjacent resources may be adversely affected.

The breadth of power delegated to local governments by these New York statutes can be inferred from those sections of state law that authorize local governments to adopt comprehensive plans, to which all local land use regulations must conform. These provisions, loosely known as the Planning Enabling Act, define a "land use regulation" as a "local law enacted by the [municipality] for the regulation of any aspect of land use and *community resource protection* and include[] any zoning, subdivision, special use permit or site plan regulation *or any other regulation* which prescribes the appropriate use of property or the scale, location and intensity of development."⁷⁰

Using the standard approach to statutory interpretation, a strong argument can be made that local environmental laws may be adopted as part of a community's land use regime. The arguments in support of this proposition are several. First, the zoning enabling act makes it clear that one of its purposes is to encourage "the most appropriate use of the land throughout [the] municipality."⁷¹ Laws that discourage the degradation of steep slopes, historic viewsheds, and critical vegetative masses certainly encourage the most appropriate use of the land. This may not rise to the level of ambiguity of meaning that even triggers an inquiry as to whether such power is necessarily implied or incident to the powers expressly granted. Further, the statutes delegating power to localities to adopt subdivision and site plan regulations make it clear that environmental standards may be included in such regulations.⁷² Finally, there is clear evi-

⁶⁸ *Id.* at 277.

⁶⁹ *Id.* at 278.

⁷⁰ N.Y. GEN. CITY LAW § 28-a (3)(b) (McKinney Supp. 2001) (emphasis added); N.Y. TOWN LAW § 272-a (2)(b) (McKinney Supp. 2001) (emphasis added); N.Y. VILLAGE LAW § 7-722 (2)(b) (McKinney Supp. 2001) (emphasis added).

⁷¹ N.Y. TOWN LAW § 263 (McKinney 1994); N.Y. VILLAGE LAW § 7-704 (McKinney 1996).

⁷² See *supra* notes 64–67 and accompanying text.

dence that the legislature intended land use regulations in New York to be adopted to achieve environmental objectives.⁷³

When this type of language is found in statutes delegating zoning and other land use powers to local governments, a strong argument can be made that local land use regulations can include standards that are protective of the environment, including free-standing environmental laws that protect discrete natural resources from the adverse impacts of development. Where this is not the case, where strict construction of tightly drafted delegation statutes thwarts such arguments, other sources of authority have to be found to support the adoption of local environmental laws.

In New York, municipalities have been delegated additional authority to protect the environment under the state's home rule law. The home rule provisions of Article IX of the New York Constitution and legislation passed pursuant to it give local governments broad home rule powers.⁷⁴ The state legislature implemented Article IX with the enactment of the Municipal Home Rule Law ("MHRL"), the provisions of which are to be "liberally construed."⁷⁵ Under the MHRL, localities are given the authority to adopt laws relating to their "property, affairs or government,"⁷⁶ to "the protection and enhancement of [their] physical and visual environment,"⁷⁷ and to the matters delegated to them under the statute of local governments.⁷⁸ The statute of local governments delegates to municipalities the power "to adopt, amend and repeal zoning regulations" and to "perform comprehensive or other planning work relating to its jurisdiction."⁷⁹

The MHRL has been regarded as a source of authority to regulate land use.⁸⁰ It also has been interpreted to permit the enactment of purely environmental laws. For example, in *Ardizzone v. Elliot*,⁸¹ the court stated that the municipality had the "power to regulate the freshwater wetlands within its boundaries under the Municipal Home Rule Law."⁸² This broad authority is critical to enacting laws that protect resources such as wildlife and wildlife habitat that may not fit squarely within the ambit of traditional zoning laws. The grant of authority encompassed in the MHRL provides a safety net for communities desiring to enact extensive environmental laws. This, combined with the power of local governments to include environmental standards in their zoning and land use regulations, provides ample authority for the state's villages, towns, and cities to cre-

⁷³ See *supra* note 70 and accompanying text.

⁷⁴ See N.Y. CONST. art. IX.

⁷⁵ N.Y. MUN. HOME RULE LAW § 51 (McKinney 1994).

⁷⁶ *Id.* § 10(1)(i).

⁷⁷ *Id.* § 10(1)(ii)(a)(11).

⁷⁸ *Id.* § 10(1).

⁷⁹ N.Y. MUN. HOME RULE LAW §§ 10(6), (7) (McKinney 1994).

⁸⁰ See *Sherman v. Frazier*, 446 N.Y.S.2d 372, 377 (App. Div. 1982).

⁸¹ 550 N.E.2d 906 (N.Y. 1989).

⁸² *Id.* at 908.

ate an integrated set of land use laws. Environmental laws may be added to the municipality's suite of land use laws by adopting them under the MHRL and zoning enabling act or the subdivision or site plan delegation statutes and by referring to the broad language of the planning enabling acts.

Georgia is regarded as a strict constructionist state where local governments have only those powers expressly granted and any reasonable doubt about their authority is resolved in the negative.⁸³ The delegation of comprehensive planning authority to local governments in Georgia, however, is tied to the state's interest in protecting and preserving "the natural resources, the environment, and the vital areas of the state."⁸⁴ Certain elements are required to appear in local comprehensive plans, including plans for the protection of natural and historic resources.⁸⁵ Under the rules of the Office of Coordinated Planning in Georgia, local land use planning is to strike a balance between the protection of vulnerable natural and historic resources and respect for individual property rights.⁸⁶ Under separate state legislation, local governments in Georgia are required to identify existing river corridors and to adopt river corridor protection plans as part of their planning process.⁸⁷ They have the further authority to regulate shoreland developments.⁸⁸ Finally, Georgia municipalities may regulate land-disturbing authority in order to control soil erosion and sedimentation.⁸⁹

Connecticut statutes give local zoning commissions flexibility to design individual programs in order to meet their municipal development and conservation needs and to take into account unique conditions.⁹⁰ The Connecticut legislature has provided towns and cities authority to protect the environment,⁹¹ to acquire open space lands from private owners,⁹² and to establish conservation commissions.⁹³ Localities can also purchase development rights on agricultural land.⁹⁴ State statutes establish a detailed system for the creation of an inland wetlands and watercourse protection regime that allows local wetland agencies to have significant control over development affecting wetlands and watercourses.⁹⁵ Local governments

⁸³ *Kirkland v. Johnson*, 76 S.E.2d 396, 398 (Ga. 1953).

⁸⁴ GA. CODE ANN. § 36-70-1 (2000).

⁸⁵ GA. COMP. R. & REGS. r. 110-12-1-.04(5) (1997).

⁸⁶ *Id.* r. 110-12-1-.04(5)(f)(1).

⁸⁷ GA. CODE ANN. § 12-2-8(2) (2001).

⁸⁸ *Id.* § 12-5-241.

⁸⁹ *Id.* § 12-7-4.

⁹⁰ MICHAEL A. ZIZKA, WHAT'S LEGALLY REQUIRED? A GUIDE TO THE LEGAL RULES FOR MAKING LOCAL LAND-USE DECISIONS IN THE STATE OF CONNECTICUT 55 (1997) (citing CONN. GEN. STAT. § 8-2 (2001)).

⁹¹ CONN. GEN. STAT. § 7-148(c)(8) (2001).

⁹² *Id.* § 7-131b.

⁹³ *Id.* § 7-131a.

⁹⁴ *Id.* § 7-131q.

⁹⁵ *Id.* §§ 22a-36 to 22a-45.

in Connecticut can adopt wetlands regulations that are stricter than the wetlands standards of the state.⁹⁶ Applications made to local review agencies seeking development approval must contain a soil erosion and sediment control plan, and local zoning and subdivision regulations must make proper provision for soil erosion and sediment control.⁹⁷

In North Carolina, the state legislature adopted a legislative rule of broad construction of powers delegated to local governments.⁹⁸ Prior to that time, the courts had applied Dillon's Rule, strictly construing specific grants of authority to local governments.⁹⁹ A Raleigh, North Carolina, requirement that a developer create open space in a subdivision and convey title to it to a private homeowners' association was upheld using the legislative rule of broad construction.¹⁰⁰ The reach of this rule was evident in *Homebuilders Ass'n v. City of Charlotte*,¹⁰¹ in which the power to impose user fees on applicants for rezoning, special use permits, plat approvals, and building inspections was upheld in the absence of expressly delegated authority. How far the North Carolina courts will go in upholding local environmental laws under this rule is not known. It has been argued, however, that the state's zoning enabling statute, which allows localities "to regulate the percentage of lots that may be occupied, the size of yards, courts and other open spaces[,] provides authority to require buffers along waterways, to protect important natural areas, and to set requirements that authorize or even mandate clustered development schemes."¹⁰²

In Colorado, the Local Government Land Use Control Enabling Act of 1974¹⁰³ ("Land Use Enabling Act") and the Colorado Land Use Act¹⁰⁴ provide local governments with the authority to adopt local environmental laws.¹⁰⁵ The Colorado Land Use Act was enacted in part "to en-

⁹⁶ *Aaron v. Conservation Comm'n*, 441 A.2d 30, 37 (Conn. 1981).

⁹⁷ CONN. GEN. STAT. § 22a-329 (2001).

⁹⁸ N.C. GEN. STAT. § 160A-4 (1999).

It is the policy of the General Assembly that the cities of this State should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect

Id.

⁹⁹ See *supra* note 58.

¹⁰⁰ *River Birch Assocs. v. City of Raleigh*, 388 S.E.2d 538, 542-44 (N.C. 1990).

¹⁰¹ 442 S.E.2d 45 (N.C. 1994).

¹⁰² David W. Owens, *Local Government Authority to Implement Smart Growth Programs: Dillon's Rule, Legislative Reform, and the Current State of Affairs in North Carolina*, 35 WAKE FOREST L. REV. 671, 701 (2000) (quoting N.C. GEN. STAT. §§ 153A-340(a), 160A-381 (1999)).

¹⁰³ COLO. REV. STAT. §§ 29-20-101 to 29-20-107 (2001).

¹⁰⁴ *Id.* §§ 24-65-101 to 24-65.1-502.

¹⁰⁵ See *id.* §§ 29-20-101 to 29-20-105 (Local Government Land Use Enabling Act of

courage uses of land and other natural resources which are in accordance with their character and adaptability [and] to conserve soil, water, and forest resources”¹⁰⁶ To meet these objectives, the Colorado legislature established the Colorado Land Use Commission (“Commission”), whose duty it is to develop a land use planning program that “may include but need not be limited to an environmental matrix.”¹⁰⁷ The Commission is required to recognize that “the decision-making authority as to the character and use of land shall be at the lowest level of government possible.”¹⁰⁸ The purpose of the Land Use Enabling Act is to achieve “planned and orderly development within [the state]” and to maintain a balance between “basic human needs” and “legitimate environmental concerns.”¹⁰⁹

The Colorado Land Use Act grants local governments, in conjunction with the appropriate state agencies, the authority to identify, designate, and promulgate guidelines for areas and activities of state interest.¹¹⁰ The Act limits local governments’ legislative authority to certain activities and listed areas of state interest.¹¹¹ There are twenty-one potential areas or activities of state interest, a menu of regulatory options for local lawmakers. These include mineral resource, flood hazard, and wildlife habitat areas, as well as site selection and development of new communities and solid waste disposal sites.¹¹² Local governments may adopt regulations that are stricter than the requirements of the criteria listed in the state statute.¹¹³ Colorado authorizes local governments to appoint planning commissions entrusted with the preparation and adoption of master plans.¹¹⁴ A master plan provides a local government with the authority to make recommendations regarding the physical development of its territories, such as the general location of open spaces and designated federal, state, and local wildlife areas, areas containing steep slopes, wetlands, floodplains, and highly erodible land or unstable

1974); *id.* §§ 24-65-101 to 24-65-106 (Colorado Land Use Act).

¹⁰⁶ *Id.* § 24-65-102.

¹⁰⁷ *Id.* § 29-65-104(1)(a).

¹⁰⁸ COLO. REV. STAT. § 24-65-104(1)(b) (2001).

¹⁰⁹ *Id.* § 29-20-102.

¹¹⁰ *See id.* §§ 24-65.1-101, 24-65.1-302 (stating that the “appropriate state agencies” are primarily Colorado’s Water Conservation Board, Soil Conservation Board, Soil Conservation Districts, Geological Survey, State Forest Service, Division of Mines and Department of Natural Resources).

¹¹¹ *Id.* §§ 24-65.1-201, 24-65.1-203, 24-65.1-301. *See also* City and County of Denver v. Bd. of County Comm’rs, 782 P.2d 753 (Colo. 1989) (holding that these limits contain sufficient safeguards to satisfy the state constitutional bar on delegation of legislative power).

¹¹² OFFICE OF SMART GROWTH, COLO. DEP’T OF LOCAL AFFAIRS, LAND USE PLANNING IN COLORADO 3-4 (2001), <http://www.dola.state.co.us/SmartGrowth/Documents/Land%20Use%20Planning%20In%20Colorado.pdf>; *see also* COLO. REV. STAT. §§ 24-65.1-201 to 24-65.1-204 (2001).

¹¹³ COLO. REV. STAT. § 24-65.1-402.

¹¹⁴ *See id.* §§ 24-65-101 to 24-65.1-502.

soils.¹¹⁵ Based on this cumulative authority, the Colorado courts have held that local governments may adopt environmental laws.¹¹⁶

State legislatures in a number of states have granted local governments home rule authority. Grants of home rule power provide varying authority to municipalities to operate broadly regarding local affairs, instead of having to rely on various express grants of authority for particular purposes. The South Dakota Constitution, for example, provides that “[a] chartered governmental unit may exercise any legislative power or perform any function not denied by its charter, the Constitution or the general laws of the state Powers and functions of home rule units shall be construed liberally.”¹¹⁷

State legislatures can provide broad “police power” authority to their municipalities. In Utah, for example, the legislature conferred upon cities the authority to enact all ordinances and regulations “necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort, and convenience of the city and the inhabitants thereof, and for the protection of property in the city.”¹¹⁸ In interpreting this statute, the Utah Supreme Court has discarded a strict application of Dillon’s Rule, stating, “If there were once valid policy reasons supporting the rule, we think they have largely lost their force and that effective local self-government, as an important constituent part of our system of government, must have sufficient power to deal effectively with the problems with which it must deal.”¹¹⁹

¹¹⁵ See *id.* §§ 30-28-106, 31-23-206.

¹¹⁶ See *id.* § 29-65-102. State courts confirm that the Land Use Enabling Act gives local governments the authority to adopt local environmental laws. See *Colo. State Bd. of Land Comm’r v. Colo. Mined Land Reclamation Bd.*, 809 P.2d 974 (Colo. 1991) (determining that regulation of mining operations was within the legislative intent of the Land Use Enabling Act whereby local governments have the authority to regulate the use of land by various means); see also *City of Colorado Springs v. Bd. of County Comm’rs.*, 895 P.2d 1105 (Colo. App. 1994) (explicitly endorsing environmental concerns with respect to local government land use planning).

¹¹⁷ S.D. CONST. art. IX, § 2; see also ILL. CONST. art. 7, § 6 (stating that “a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare”). The California constitution provides that a city “may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” CAL. CONST. art. 11, § 7.

¹¹⁸ UTAH CODE ANN. § 10-8-84 (1999 & Supp. 2001).

¹¹⁹ *State v. Hutchinson*, 624 P.2d 1116, 1120 (Utah 1980). In several other states, the general grant of the police, or general welfare, authority to local governments has been construed by courts to convey power beyond that granted by specific statutory acts. See, e.g., *Birkenfeld v. City of Berkeley*, 550 P.2d 1001 (Cal. 1976) (allowing rent-control initiative); *Leavenworth Club Owners Assoc. v. Atchison*, 492 P.2d 183 (Kan. 1971) (allowing ordinance restricting sale of liquor); *City of Duluth v. Cerveney*, 16 N.W.2d 779 (Minn. 1944) (allowing liquor seizure ordinance); *Lehrhaupt v. Flynn*, 356 A.2d 35 (N.J. Super. Ct. 1976) (allowing financial disclosure ordinance); *City of Hobbs v. Biswell*, 473 P.2d 917 (N.M. Ct. App. 1970) (allowing regulation of pawnbrokers); *Krolick v. Lowery*, 302 N.Y.S.2d 109 (App. Div. 1969) (upholding regulation requiring blood tests from firemen); *Adams v. City of New Kensington*, 55 A.2d 392 (Pa. 1947) (allowing license fees for juke-

In other states, the law may be less favorable to the adoption of local environmental laws. Those states' planning and zoning enabling acts may be more narrowly drawn, their courts' interpretations of those acts may be less expansive, their home rule provisions may be less generous, or they may lack specific statutes authorizing municipalities to protect some environmental resources. It should not be surprising, however, even in states that are conservative in the delegation of land use power to their localities, to find specific provisions (such as those in Georgia and North Carolina) that permit the adoption of local environmental laws. To the extent that state law reform follows the models recommended by the Growing Smart Program of the American Planning Association ("APA"), greater authority will be found in the future.¹²⁰

V. APPLICATIONS AND EXAMPLES OF LOCAL ENVIRONMENTAL LAWS

In this Part, the invention of local environmental law by local legislatures is illustrated by reference to specific laws adopted by local legislative bodies in several states with references to state enabling statutes and to model legislation recommended by the Growing Smart Program of the APA. The examples set forth below follow a logical order, organized as they might be by a local government that wished to adopt a comprehensive program of environmental protection. This Part begins with the authority of local governments to establish environmental objectives in their comprehensive plans and illustrates how traditional land use devices such as the zoning ordinance, other zoning mechanisms, and subdivision and site plan regulations can be used to protect the environment and natural resources. It then examines local environmental laws that are focused more exclusively on environmental protection, including environmental impact review requirements, the protection of environmental resources such as aquifers, habitats, floodplains, ridgelines and hilltops, scenic resources, steep slopes, forests and trees, and wetlands and watercourses. Included are local laws that control soil erosion, surface water sedimentation, and storm water, and that permit the transfer of development rights from conservation areas to development areas.

A. Comprehensive Planning

If a community wishes to adopt local laws that regulate the environment, it may create a legal basis for those regulations in its comprehensive plan. Since many states require that local land use regulations conform to the comprehensive plan, such provisions help sustain environ-

boxes); *City of Pasco v. Dixon*, 503 P.2d 76 (Wash. 1972) (allowing ordinance that prohibited disturbing and indecent behavior in public).

¹²⁰ See *infra* note 129.

mental regulations when they are challenged.¹²¹ Washington State requires that local governments not only designate critical environmental areas and adopt development regulations to protect these areas but also use the “best available science” when these regulations are adopted.¹²² Local comprehensive plans in New York may identify and provide for the preservation of historic and cultural resources, natural resources, and sensitive environmental areas.¹²³ In Clinton, New York, the comprehensive plan establishes a foundation for environmental protection laws by referencing the large number of critical environmental resources that exist in the town. It contains clear strategies for protecting those resources including the use of clustered subdivisions, protection of wetlands, slopes, and wildlife habitat; control of erosion and sedimentation; and the creation of open spaces and green space corridors.¹²⁴

¹²¹ See N.Y. TOWN LAW § 263 (McKinney Supp. 2001); N.Y. VILLAGE LAW § 7-704 (McKinney 1996); N.Y. GEN. CITY LAW § 20(25) (McKinney Supp. 2001). “The law in many states now also addresses several other land use controls with a focus on their need to relate to a comprehensive plan.” JOSEPH DiMENTO, RATHKOPF’S THE LAW OF ZONING AND PLANNING § 14:1 (2001).

¹²² See WASH. REV. CODE ANN. § 36.70A.172 (West 2001). The Washington statute reads as follows:

In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas. In addition, counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.

Id. The statute also requires that each county and city in Washington shall designate:

- (a) Agricultural lands that are not already characterized by urban growth and that have long-term significance for the commercial production of food or other agricultural products;
- (b) Forestlands that are not already characterized by urban growth and that have long-term significance for the commercial production of timber;
- (c) Mineral resource lands that are not already characterized by urban growth and that have long-term significance for the extraction of minerals; and
- (d) Critical areas.

Id.

¹²³ See N.Y. TOWN LAW § 272-a(3)(d) (McKinney Supp. 2001); N.Y. VILLAGE LAW § 7-722(3)(d) (McKinney 1996); N.Y. GEN. CITY LAW § 28-a(4)(d) (McKinney Supp. 2001).

¹²⁴ CLINTON, N.Y., MASTER PLAN §§ 3.1, 3.6, 3.7, 3.9, 8.1, 8.8 (1991). The full text of these sections follows:

Despite its location in close proximity to Poughkeepsie and the spreading urbanized area, Clinton retains large areas of agricultural and undeveloped land. The town contains a wide variety of natural resources of exceptional quality, including lakes, extensive wetlands, large wooded tracts, rural settings, and several creek basins. These and other natural features are considered amenities that attract development, but they can also place environmental constraints on actual construction.

§ 3.1 The town should discourage the development and encourage protection of 100-year floodplains, wetlands, surface waters, slopes over 15 percent, and ridge-

In Delaware, county comprehensive plans must include a "conservation element for the conservation, use and protection of natural resources in the area and which results in the identification of these resources."¹²⁵ The conservation element needs to at least identify and provide for the proper stewardship of "wetlands, wood uplands, habitat areas, geological areas, hydrological areas, floodplains, aquifer recharge areas, ocean beaches, soils, and slopes."¹²⁶ Delaware county comprehensive plans must also consider agricultural uses, silvicultural uses, and watershed protection in their conservation elements.¹²⁷

Similarly, in Florida, conservation elements of comprehensive plans must provide for the conservation, use, and protection of natural resources in the community, including "wetlands, . . . estuarine marshes, soils, beaches, shores, flood plains, rivers, bays, lakes, forests, fisheries and wildlife, [and] marine habitat."¹²⁸

Another approach to using the comprehensive plan to achieve environmental protection is found in the *Growing Smart Legislative Guidebook*.¹²⁹ It suggests that state planning statutes be amended to require local planning agencies to prepare an "environmental evaluation" in which they evaluate the environmental impacts of each element of their comprehensive plans before adoption. An important component of the planning system in Georgia is the preparation of a twenty-year comprehensive plan by each county and municipality, which has several required elements including the preservation of natural and historic resources.¹³⁰

lines to ensure minimal disruption of their environmental function and scenic qualities.

§ 3.6 Important wildlife habitats and other significant environmental areas should be identified and protected.

§ 3.7 Measures to control erosion and sedimentation should be required during the development review process.

§ 3.9 A defined open space system should be part of every site plan proposal and, where possible, be linked to form continuous greenspace corridors. Natural corridors should be particularly encouraged along streambeds and wetlands to provide open space, wildlife habitat, and groundwater protection.

§ 8.1 The town should encourage high quality design and construction, with the retention of existing trees whenever possible and the extensive use of landscape elements that integrates new development with the surrounding area.

§ 8.8 The Planning Board should have the authority to mandate clustering as an effective means to reduce housing costs, limit access points, and provide additional recreation and open space.

Id.

¹²⁵ DEL. CODE ANN. tit. 9, § 6956(g)(4) (2000).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ FLA. STAT. ANN. § 163.3177(6)(d) (West 2000).

¹²⁹ AM. PLAN. ASS'N, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE 12-17 to 12-20 (Stuart Meck ed., 2002).

¹³⁰ GA. COMP. R. & REGS. r. 110-12-1-.04(5)(c) (1997).

B. Zoning

Local zoning ordinances in some states contain provisions that directly protect the environment. The zoning ordinance of the town of Hamden, Connecticut, for example, contains the following language in its purposes clause:

promoting the health, safety, and general welfare of the community . . . minimizing public and private losses due to flood conditions . . . encouraging the most appropriate use of land throughout the town . . . protecting existing and potential public surface and ground drinking water supplies . . . and encouraging the development of housing opportunities for all citizens of the municipality consistent with soil types, terrain and infrastructure capacity and insuring that proper provisions are made for soil erosion and sediment control.¹³¹

Long ago, judicial approval of two-acre zoning was based on courts' understanding of the public interest in the "present character, appearance and environment of this rural high-class residential community."¹³² Zoning codes historically contain specific "nuisance prevention" provisions such as the elimination of junkyards in environmentally sensitive areas. Zoning may prevent certain nuisance-type uses from locating anywhere in the community. Under this authority, solid waste facilities, manufactures of hazardous substances, certain mining operations, and other high-intensity uses are prohibited.

A model state zoning enabling statute recommended by the *Growing Smart Legislative Guidebook* provides for zoning ordinances to regulate development projects that may affect views and scenic resources, drainage and storm water runoff, soil erosion and sedimentation, the quality of air and water, critical and sensitive areas, and natural hazard areas, including floodplains.¹³³ Another model statute contained in the *Growing Smart Legislative Guidebook* authorizes localities to adopt mitigation programs to minimize the adverse effects of land uses in critical and sensitive areas identified in a locality's comprehensive plan. This statute gives local land use agencies the authority to require land developers to provide environmental benefits offsetting the adverse impacts of their developments on these sensitive environmental areas.¹³⁴ To the extent that express language such as this exists in a state's zoning enabling act, local

¹³¹ HAMDEN, CONN., ZONING REGS. art. I, § 100 (2000).

¹³² *Elbert v. North Hills*, 28 N.Y.S.2d 317, 318 (Gen. Term 1941), *rev'd* 28 N.Y.S.2d 172 (App. Div. 1941).

¹³³ See AM. PLAN. ASS'N, *supra* note 129, at 8-51 to 8-56.

¹³⁴ *Id.* at 9-83 to 9-90.

zoning ordinances can contain provisions that aim to protect environmental resources.

One zoning technique that is emerging to protect critical or sensitive environmental areas is the adoption of zoning districts with boundaries that are coterminous with the natural boundaries of such areas. An example of this is found in the zoning ordinance of the town of Putnam Valley in New York, which establishes a Preservation District. The ordinance states that its purpose is to

preserve, protect and enhance the value of natural resources in all respects including topographical and geological features, vegetation, wildlife, watersheds and wetlands, areas of scenic beauty, and other land and community resources whose retention is necessary for the continued maintenance of the quality of the environment and to discourage development on land with ecologically important resources, land subject to flooding, areas with excessive slopes, or other land features that could, if not properly protected, endanger human life or property.¹³⁵

The extent to which zoning enabling statutes authorize local governments to protect the environment is still being explored in many states. An Open Space Conservation ("O-C") Zoning District was upheld by the Ohio Supreme Court as a legitimate exercise of police power in *Reed v. Rootstown Township Board of Zoning Appeals*.¹³⁶ The court determined that a five-acre minimum lot size was reasonable since the district essentially comprised a swamp.¹³⁷ An Ohio court in *Reese v. Copley Township Board of Trustees*¹³⁸ upheld a municipality's decision to adopt a conservation zoning district, finding that "[a] zoning regulation is presumed to be constitutional unless determined by a court to be clearly arbitrary and unreasonable and without substantial relation to the public health, safety, morals, or general welfare of the community."¹³⁹ Ohio

¹³⁵ PUTNAM VALLEY, N.Y., CODE § 165-11 (2001), available at <http://www.generalcode.com>.

¹³⁶ 458 N.E.2d 840 (Ohio 1984).

¹³⁷ *Id.* at 842.

¹³⁸ 716 N.E.2d 1176 (Ohio Ct. App. 1998).

¹³⁹ *Id.* at 1180 (citing *Goldberg Cos. v. Richmond Heights City Council*, 690 N.E.2d 510, 514 (Ohio 1998)). According to the *Reese* court, the purpose of the O-C District is:

- A) To preserve and protect the values of distinctive geologic, topographic, botanic, historic, and scenic areas;
- B) To preserve and protect the ecologic balance of an area;
- C) To conserve natural resources, such as river valley and tracts of forest land; and
- D) To reduce the problems created by intensive development of areas having excessively high water tables, organic or other soils unsuitable for most types of urban development. (citing *Copley Township Zoning Regulations*, 440).

courts have also upheld zoning regulations designed to protect underground water resources. In *Ketchel v. Bainbridge Township*, the court disagreed with the landowner's claim that they had an absolute right to use groundwater without concern for the consequences to neighboring landowners.¹⁴⁰ The zoning provisions limited the development of the land "in accordance with the ability of such lands to support development without central water supply and/or central sewage disposal facilities, to prevent pollution of such lands and the underlying aquifers by excessive development, and to protect the aquifer recharge areas."¹⁴¹ The court decided that the protection of underground water resources was a legitimate and proper objective of zoning and that an adequate and safe water supply is essential for the public health and welfare.¹⁴²

C. Overlay Zoning

Overlay zoning is a flexible zoning technique that allows a municipality to limit development in certain environmentally sensitive areas. An overlay zone is a mapped overlay district superimposed on one or more established zoning districts. Environmental overlay district boundaries may be drawn to follow the boundaries of a natural resource, such as a watershed or floodplain. An overlay zone supplements the underlying zoning standards with additional requirements that can be designed to protect the natural features in an important environmental area.¹⁴³ A parcel within the overlay zone is regulated simultaneously by two sets of zoning regulations: the underlying zoning district provisions and the overlay zoning requirements. A unique natural or aesthetic resource area, such as a pine barren, wetland resource area, watershed, or tidal basin, can be identified and protected in this way.

The city of Tucson, Arizona, adopted an overlay zoning district that imposes additional regulatory standards on areas prone to periodic washes to protect natural vegetation and sensitive wildlife habitat.¹⁴⁴ Holladay, Utah, adopted an overlay zone covering an area of foothills and canyons to protect their wildlife habitat, steep slopes, ridgelines, and views.¹⁴⁵ The town of Putnam Valley, New York, has adopted a number of

Id.

¹⁴⁰ 557 N.E.2d 779, 782 (Ohio 1990).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Local governments in the Pacific Northwest, for example, could establish overlay districts in watersheds critical to the protection of threatened species of salmon in compliance with the objectives of regulations issued by the National Marine Fisheries Service. See *supra* note 16. Within those districts they could establish regulatory standards to prevent land uses that could injure or kill the protected species.

¹⁴⁴ TUCSON, ARIZ., LAND USE CODE § 2.8.6 (2001), available at <http://www.ci.tucson.az.us/planning/luc/art2div8.pdf>.

¹⁴⁵ HOLLADAY, UTAH, CODE ch. 13.72 (2001) ("Foothills & Canyons Overlay Zone"). The ordinance dedicates an entire chapter to foothills and canyons site development and

zoning overlay districts, among them a hillside management district ("HM").¹⁴⁶ The HM provisions of the town's zoning ordinance protect the environmental functions of ridgelines and slopes and preserve hillsides as scenic resources. The ordinance requires the planning board to consider carefully and to mitigate adverse impacts on this resource in reviewing development plans.¹⁴⁷

The *Growing Smart Legislative Guidebook* contains a model state enabling act that authorizes local governments to adopt and enforce environmental overlay zones.¹⁴⁸ The enabling act authorizes localities to adopt Critical and Sensitive Areas Overlay Districts for a variety of purposes, such as ensuring the quality of drinking water and water systems, conserving natural resources, preventing contamination of the natural environment, protecting wetland resources, and minimizing damage from floods, severe storms, and other hazards. This law allows local governments to issue conditional-use permits in protected environmental areas

design standards. The section describes ways to balance the rights of landowners with the protection of the city's sensitive lands. *Id.* ch. 13.73.010.

¹⁴⁶ PUTNAM VALLEY, N.Y., ZONING ORDINANCE § 5.4 (1996) ("Hillside Management District").

Los Angeles established regulations to protect hillsides by reference to a Hillside Area Map prepared by its Bureau of Engineering. It applies those standards to most development activities within this "district," including additions to single-family homes, road development, and subdivisions. *See* LOS ANGELES, CAL., CODE § 12.03 (2001); *see also* Los Angeles, Cal., Hillside Regulations, Ordinance 168,159 (Sept. 14, 1991).

¹⁴⁷ PUTNAM VALLEY, N.Y., ZONING ORDINANCE § 5.4.1 (1996). This ordinance contains the following language:

§ 5.4.1 Purpose and Intent

The purpose and intent of the Hillside Management (HM) District is to implement the programs and policies of the Master Plan, as they relate to protecting designated ridgelines and steeply sloped areas from erosion, and maintaining the natural character and amenity of hillsides and ridgelines as a scenic resource of the town.

In reviewing plans for development in hillside areas and along designated ridgelines, the Planning Board shall act to insure the attainment of the following objectives:

- A. The preservation of natural topographic features and appearances by means of land sculpturing so as to blend any man-made or manufactured slope into the natural topography;
- B. The retention of major natural topographic features, such as drainage swales, steep slopes, watershed areas, floodplains, view corridors and scenic vistas;
- C. The preservation and enhancement of prominent landmark features, such as natural rock outcroppings, prominent trees and plants, other areas of special natural beauty, and stone walls and structures;
- D. The utilization of clustered sites and buildings in areas with extreme topographical features so as to reduce grading alterations on slopes; and
- E. The preservation and introduction of plants so as to protect slopes from soil erosion and minimize the visual effects of grading and construction on hillside areas.

Id.

¹⁴⁸ *See* AM. PLAN. ASS'N, *supra* note 129, at 9-5 to 9-10.

and to require for specific types of land development that mitigation conditions be met in order to obtain permits. Mitigation measures may include changes in proposed alterations of the land, such as filling, grading, and paving. The measures may also impose best management practices, such as minimizing nonpoint source pollution through the use of detention ponds, vegetative buffers, and reduced road salting.

D. Incentive Zoning

Statutes in some states authorize localities to permit developers to build at greater densities than allowed under their zoning district provisions in exchange for public benefits such as the preservation of open space. For example, the town of LaGrange, New York, awards a forty percent density bonus when a developer promises to preserve eighty percent of a site for farming purposes.¹⁴⁹ New York law allows communities to receive cash payments in exchange for zoning incentives awarded to developers.¹⁵⁰ This permits localities to use the cash to provide for the public benefit directly. Cash received from a developer for a twenty percent increase in permitted density can be used, for example, to purchase the development rights on other land that the community wishes to maintain as open space. Density bonuses of this type are provided to developers who own land in areas where development impacts can be absorbed and where supportive infrastructure exists. Incentive zoning is one technique municipalities may use to implement their comprehensive plans when those plans identify areas that are appropriate for greater development densities and conservation areas that contain environmentally sensitive lands.

E. Subdivision Approvals

Subdivision regulations adopted by local legislatures or planning boards can require that environmental features be revealed in maps, plans, and drawings submitted for review. Under Colorado law, local governments may require subdividers to submit proper drainage plans to prevent erosion problems and flooding.¹⁵¹ Colorado municipalities are also permitted to require subdividers to provide for adequate and convenient open spaces for recreation, light, and air, and for the avoidance of congested populations.¹⁵² Subdivision regulations can also authorize the

¹⁴⁹ LAGRANGE, N.Y., CODE ch. 100, art. III, § 100-31C(3) (1998).

¹⁵⁰ See N.Y. TOWN LAW § 261-b (McKinney Supp. 2001); N.Y. VILLAGE LAW § 7-703 (McKinney 1996); N.Y. GEN. CITY LAW § 81-d (McKinney Supp. 2001).

¹⁵¹ See COLO. REV. STAT. §§ 30-28-133, 31-23-214 (2001); see also MICHAEL M. SHULTZ & JEFFREY B. GROV, *THE PREMATURE SUBDIVISION OF LAND IN COLORADO* 9-14 (1989).

¹⁵² See COLO. REV. STAT. §§ 30-28-133, 31-23-214 (2001).

reviewing body to require developers to change the design or layout of their proposed projects to prevent environmental damage or to preserve natural resources nearby.¹⁵³

The subdivision ordinance of the town of North Salem, New York, illustrates how environmental features on land that is to be subdivided can be protected. It requires the local planning board to avoid soil erosion, encroachment on watercourses and wetlands, and unnecessary removal of trees and vegetative cover.¹⁵⁴ State law in Washington provides that subdivision plans shall not be approved unless the responsible local agency finds that "appropriate provisions are made for . . . open spaces, drainage ways, . . . potable water supplies, sanitary wastes, parks and recreation, [and] playgrounds"¹⁵⁵ New Jersey's subdivision statute requires that local subdivision ordinances contain requirements for water supply, drainage, shade trees, and "open space to be set aside for use and benefit of the residents of the planned development."¹⁵⁶ Several states, including New York, grant extensive authority to local approval boards to require on-site open space or recreational set-asides to serve the needs of the occupants of new residential developments.¹⁵⁷

¹⁵³ See N.Y. TOWN LAW §§ 276–278 (McKinney Supp. 2001); N.Y. VILLAGE LAW §§ 7-728 to 7-730 (McKinney Supp. 2001); N.Y. GEN. CITY LAW §§ 32–34, 37 (McKinney Supp. 2001).

¹⁵⁴ NORTH SALEM, N.Y., CODE § 200-21 (1997). The subdivision ordinance states in part:

§ 200-21 Natural features

The planning and design of the [subdivision] plat, including related streets, drainage and other improvements, shall provide for preservation of significant natural features of the tract as follows:

- A. By avoiding cuts or fills which result in potential soil erosion and excessive tree removal or which disturb water resources.
- B. By avoiding construction which results in relocation of or encroachment upon watercourses and water bodies;
- C. By avoiding filling or excavation of or encroachment upon wetlands, floodplains and other land subject to potential flooding.
- D. By avoiding removal of large isolated trees and mature woods and other desirable vegetation and removal of stone walls.
- E. By providing for preservation of wetlands, watercourses and water bodies and for the protection thereof by easement, reservation area or other controls to prevent excavation, filling or encroachment.
- F. By avoiding rock excavation by blasting which may cause unintended damage or injury to property or persons in the vicinity.

Id.

¹⁵⁵ WASH. REV. CODE § 58.17.110 (1998).

¹⁵⁶ N.J. STAT. ANN. § 40:55D-38(b) (West 1997).

¹⁵⁷ N.Y. TOWN LAW § 277(4) (McKinney Supp. 2001); N.Y. VILLAGE LAW § 7-730(4) (McKinney Supp. 1996); N.Y. GEN. CITY LAW § 33(4) (McKinney Supp. 2001).

F. Site Plan Approvals

Most local governments have adopted regulations providing for the review of proposals for the development of individual parcels of land. In Austin, Texas, site plan regulations require storm water detention and environmental review. The site plan must also contain landscaping elements, identify protected trees, and address water quality and related drainage concerns. In some instances, a demonstration of general compliance with the Endangered Species Protection Ordinance is required.¹⁵⁸

A New York statute allows responsible local agencies to require that all proposed site plans show "screening, signs, landscaping, architectural features, location and dimensions of buildings, adjacent land uses and physical features meant to protect adjacent land uses as well as any additional elements specified by the [local legislative body]"¹⁵⁹ The site plan regulations of Somers, New York, allow the local planning board to impose conditions on site plan approvals to protect environmental quality, natural resources, and features on the site.¹⁶⁰

The model site plan statute proposed by the *Growing Smart Legislative Guidebook* specifies that local site plan ordinances shall include standards to preserve natural resources on the site, including topography, vegetation, floodplains, marshes, and watercourses.¹⁶¹ Some state statutes such as Rhode Island's limit local site plan review to specific and objective guidelines which must be stated in the zoning ordinance.¹⁶² Connecticut law allows site plans to be modified or disapproved if they fail to comply with the requirements set forth in the zoning ordinance or the local wetlands agency's regulations.¹⁶³ Under Connecticut law, site plans

¹⁵⁸ CITY OF AUSTIN, TEX., CODE ch. 25 (2001) ("Land Development"), available at <http://www.ci.austin.tx.us/development/ldc1.htm>.

¹⁵⁹ N.Y. TOWN LAW § 274-a(2) (McKinney Supp. 2001); N.Y. VILLAGE LAW § 7-725-a(2) (McKinney 1996); N.Y. GEN. CITY LAW § 27-a(2) (McKinney Supp. 2001).

¹⁶⁰ SOMERS, N.Y., CODE § 144-8 (1996).

§ 144-8 Standards for site plan approval.

....

The Planning Board shall specifically take into account the following:

....

C. The protection of environmental quality.

(1) Buffer areas, plantings, open spaces, walls and/or fences shall be provided as determined appropriate by the Planning Board and in accordance with other requirements of the Code of the Town of Somers so as to ensure harmony with adjacent development and land, to screen parking areas and to conceal storage and utility areas.

(2) Adequate storm and surface water drainage facilities shall be provided so as to properly drain the site, detain stormwater as necessary, minimize downstream flooding and address non-point pollution.

¹⁶¹ See AM. PLAN. ASS'N, *supra* note 129, at 8-72 to 8-74.

¹⁶² R.I. GEN. LAWS § 45-24-49(b) (1996).

¹⁶³ CONN. GEN. STAT. § 8-3(g) (2001).

are reviewed by the zoning commission, which is required to take the report of the local inland wetlands commission into consideration in making its decision.¹⁶⁴

G. Clustering

Open space and natural resources are preserved in many communities by regulations that allow or require land subdividers to cluster permitted residential density on a portion of a site. Fall River, Massachusetts, defines cluster development as "a single-family residential development in which the houses are clustered together into one or more groups on the lot and separated from each other and adjacent properties by permanently protected open space."¹⁶⁵ Massachusetts municipalities are authorized to enact zoning ordinances that permit cluster developments upon issuance of a special permit.¹⁶⁶ Where cluster development is permitted, the open land within the development must either be conveyed to the city or town for use as a park or open space, conveyed to a non-profit organization whose principal purpose is the conservation of open space, or conveyed to a corporation or trust owned by the owners of the lots or residential units within the plot.¹⁶⁷ Fall River has incorporated these requirements into its local code, specifying that open space shall be either "[c]onveyed to a community association . . . [c]onveyed to a non-profit organization . . . [or] [c]onveyed to the city at no cost."¹⁶⁸

In New York, local legislatures may authorize their planning boards to waive zoning standards such as minimum lot sizes, height requirements, and setbacks to "preserve the natural and scenic qualities of open lands."¹⁶⁹ The Bedford town board authorized its planning board to use clustering to preserve "a unique or significant natural feature of the site, including but not limited to a vegetative feature, wildlife habitat, surface water supply, underground aquifer, endangered species, rock formation, and steep slopes" or to protect "a unique or significant feature of the man-made environment of the site, including but not limited to a building, structure, or artifact of architectural, historical, or archeological value."¹⁷⁰ The town of Stanford, New York, requires residential developments to be clustered to protect agricultural soils, preserve farming, and maintain the town's rural way of life.¹⁷¹

¹⁶⁴ *Id.*

¹⁶⁵ FALL RIVER, MASS., REV. ORDINANCES § 86-322 (1997), available at <http://www.municode.com> (select "Online Codes," then select the state and relevant town).

¹⁶⁶ MASS. GEN. LAWS ANN. ch. 40A, § 9 (West 2002).

¹⁶⁷ FALL RIVER, MASS., REV. ORDINANCES § 86-322(h)(1).

¹⁶⁸ See *supra* note 165.

¹⁶⁹ N.Y. TOWN LAW § 278 (McKinney Supp. 2001); N.Y. VILLAGE LAW § 7-738 (McKinney 1996); N.Y. GEN. CITY LAW § 37 (McKinney Supp. 2001).

¹⁷⁰ BEDFORD, N.Y., CODE ch. 107, § 107.50.1 (1996).

¹⁷¹ STANFORD, N.Y., CODE ch. 164, art. V, § 164-19A(1) (1995).

H. Aquifer Protection

Some localities use their environmental authority to protect drinking water aquifers by imposing additional regulatory standards on development projects proposed in such areas. The aquifer protection ordinance of Wallingford, Connecticut, prohibits certain land uses in order to protect its groundwater resources. Landowners are prohibited from using land for businesses that use hazardous chemicals as an integral or principal part of their operation, solid waste disposal, junk yards, septage lagoons, hazardous waste drum storage areas, bulk storage piles, surface impoundments, road salt storage, or pipelines that transmit oil, gasoline, or other hazardous materials. Other uses are allowed but restricted, such as above-ground chemical and fuel storage, underground fuel storage, dry cleaning, and new or enlarged manure, fertilizer, pesticide, and herbicide storage sites.¹⁷²

Using their municipal home rule authority to protect the physical environment,¹⁷³ New York communities can adopt aquifer protection laws that restrict nonpoint source pollution resulting from land development and operations that use chemicals that can contaminate water stored in aquifers. The town of Bedford has adopted an Aquifer Protection Zone to prevent groundwater contamination. Within that zone, a variety of uses are permitted, but only after securing a special permit. Regulated activities include the operation of on-site sewage disposal systems, common septic fields, and groundwater heat pumps, and the handling and storage of road salt and de-icing materials. The Bedford ordinance prohibits some uses in its aquifer protection zone, including disposal of hazardous materials, solid waste, or septic sludge; storage of hazardous materials; and operation of dry-cleaning, dyeing, and printing and photo processing establishments.¹⁷⁴

I. Environmental Impact Review Requirements

In some states, local governments are required to conduct environmental impact reviews of their comprehensive plans and land use regulations *before* the plans and regulations are adopted. These states require that the environmental impact of significant land development proposals be reviewed by local agencies under their environmental protection acts. The states requiring this separate level of review include California, Hawaii, Massachusetts, Minnesota, New York, and Washington.¹⁷⁵ The Cali-

¹⁷² WALLINGFORD, CONN., ZONING REGS., §§ 4.12.F–4.12.K (1987) (“Aquifer Protection District”), available at <http://www.town.wallingford.ct.us/zonefm.doc>.

¹⁷³ See *supra* note 77.

¹⁷⁴ BEDFORD, N.Y., CODE ch. 125, art. 29, § 4 (1996) (“Aquifer Protection Zone”).

¹⁷⁵ CAL. PUB. RES. CODE § 21000–21178 (West 2001); HAW. REV. STAT. § 343 (2000); MASS. GEN. LAWS ANN. ch. 30, § 61–62 (West 2001); MINN. STAT. ANN. §§ 116C–116D

ifornia¹⁷⁶ and New York¹⁷⁷ statutes require local land use agencies to consider alternatives to proposed projects and to consider and impose mitigation conditions on proposed developments to protect the environment. For states that do not have such requirements, the Growing Smart Legislative Guidebook recommends that local planning agencies be required to conduct an "environmental evaluation" in which they consider and evaluate the environmental impacts of the elements of their comprehensive plans before they are adopted officially.¹⁷⁸

J. Erosion and Sediment Control

Local laws can be adopted to prevent soil erosion and the deposition of sediments in surface waters that land development projects can cause. Undeveloped land contains organic particles that are biologically and chemically active and that, when disturbed and transported to surface waters, can cause serious water quality problems. One local soil protection ordinance observes that its purpose is

to safeguard persons, protect property, prevent damage to the environment, and promote the public welfare by guiding, regulating and controlling the design, use and maintenance of any development or other activity which disturbs or breaks the surface of soil or results in the movement of earth on land situated in the town.¹⁷⁹

Jefferson County in Kentucky has adopted an Erosion Prevention and Sediment Control Ordinance "to control soil erosion and sedimentation arising from development and other land disturbing activities (e.g. clearing and grading), to prevent adverse impacts and offsite degradation"¹⁸⁰

K. Fish and Wildlife Habitat

Land development projects approved by local governments often subject fish and wildlife habitats to disruption, fragmentation, and degradation. Some municipalities have exercised the legal authority they have been delegated to protect the local environment by adopting ordinances

(West 2001); N.Y. ENVTL. CONSERVATION LAW §§ 8-0101-8-0117 (McKinney 2001); WASH. REV. CODE ANN. § 43.21C.030 (West 2001).

¹⁷⁶ CAL. PUB. RES. CODE § 21002 (West 2001).

¹⁷⁷ N.Y. ENVTL. CONSERV. LAW § 8-0109 (McKinney 2001).

¹⁷⁸ See AM. PLAN. ASS'N, *supra* note 129, at 12-17.

¹⁷⁹ YORKTOWN, N.Y., CODE ch. 165, § 165-2(B) (1991) ("Erosion and Sediment Control").

¹⁸⁰ JEFFERSON COUNTY, KEN., CODE § 159.01(C)(2) (2001) ("Erosion Prevention and Sediment Control").

to protect sensitive habitat areas from land development and clearance activities. Colorado statutes provide local governments with the authority to adopt local environmental laws that protect wildlife habitat.¹⁸¹ The purpose of the state's Local Government Land Use Control Enabling Act is to achieve orderly land development within the state that maintains a balance between the basic human needs of its changing population and "legitimate environmental concerns."¹⁸² Specifically, the Act empowers local governments

to plan for and regulate the use of land by . . . [p]rotecting lands from activities which would cause immediate or foreseeable material danger to significant wildlife habitat and would endanger wildlife species . . . [and by] [o]therwise planning for and regulating the use of land so as to provide planned and orderly use of land and protection of the environment in a manner consistent with constitutional rights.¹⁸³

Summit County, Colorado, protects wildlife through a Wildlife Habitat Overlay District that "seeks to fully protect wildlife habitats . . . from the significant adverse affects of development."¹⁸⁴ The ordinance requires that all proposals for development within the district include a special wildlife impact report that the State Division of Wildlife is to review. Adding protective provisions to subdivision or site plan regulations or adopting a separate local habitat protection law can achieve habitat conservation for threatened species and help maintain biodiversity. The city of Tumwater, Washington, has adopted a law that defines and protects habitat.¹⁸⁵

¹⁸¹ See Local Government Land Use Enabling Control Act of 1974, COLO. REV. STAT. §§ 29-20-101-107; Colorado Land Use Act, COLO. REV. STAT. §§ 24-65-101-106. See also *C&M Sand & Gravel v. Bd. of County Comm'rs*, 673 P.2d 1013 (Colo. Ct. App. 1983) (holding that sections 20-101 to 20-107 vest broad authority in local governments to regulate land use).

¹⁸² COLO. REV. STAT. § 29-20-102 (2001).

¹⁸³ COLO. REV. STAT. § 29-20-104(1)(b), (h) (2001).

¹⁸⁴ SUMMIT COUNTY, COLO., DEV. CODE § 4203.01 (2002), available at <http://www.co.summit.co.us/divisions/commdev/planning/DEVCODE/Dev%20Code%20Chapter%204.pdf>. For a similar example, see *supra* note 137.

¹⁸⁵ TUMWATER, WASH., CODE §§ 16.32.050, 16.32.060, 16.32.090 (1991) ("Fish and Wildlife Habitat Protection"). The ordinance says:

§ 16.32.050(A)(1-3) Habitats Defined and Protected

A. The following fish and wildlife habitat areas are to be protected within the City of Tumwater:

1. Areas with which endangered, threatened, and sensitive species have a primary association;
2. Naturally occurring ponds under twenty acres and their submerged aquatic beds that provide fish and wildlife habitats;
3. Lakes, ponds, streams, and rivers planted with game fish.

§ 16.32.060 Habitat Areas—Buffers

L. Floodplains

Development activities can destroy floodplains, decrease flood storage, increase runoff, and decrease water quality and quantity. Local floodplain regulations can limit the extension of buildings and infrastructure into the flood areas, require that such buildings be built at certain elevations, prevent the obstruction of stream channels, and prohibit the construction of chemical or other hazardous storage facilities.¹⁸⁶

Irvine, California, adopted a Floodplain District Ordinance for the purpose of promoting the public health, safety, and general welfare, and to minimize public and private losses due to flood conditions in specific areas.¹⁸⁷ Its floodplain ordinance notes that the flood hazard areas of the city are subject to periodic water inundation which results in loss of life and property, health and safety hazards, and extraordinary public expenditures.¹⁸⁸ The Flood Hazard Area Ordinance adopted by the city of Detroit is aimed at maintaining stable development patterns that are not subject to the "blighting influence of flood damage."¹⁸⁹ The Floodplain Protection District Ordinance of the town of Penfield, New York, contains extensive provisions to protect the environment and the public from the dangers of flooding.¹⁹⁰

To retain and protect adequate urban wildlife habitats, buffers will be established on a case-by-case basis to be defined by a habitat protection plan.

§ 16.32.090(A), (C) Habitat Areas—Protection Plan

When a protected habitat is located on a site to be developed, a Habitat Protection Plan will be submitted by the permit applicant. The Habitat Protection Plan shall contain the following information as a minimum and will be subsequently used as part of the Environmental Review process and is a condition of approval for Discretionary Permits and/or construction permits:

1. A report which contains:

A. A description of the nature, density, and intensity of the proposed development in sufficient detail to allow analysis of such land use change upon the protected fish or wildlife habitat;

....

C. A plan by the applicant which shall explain how he will mitigate any adverse impacts to protected fish or wildlife habitats created by the proposed development.

Id.

¹⁸⁶ See JON A. KUSLER, *REGULATING SENSITIVE LANDS* 59 (1980).

¹⁸⁷ See IRVINE, CAL., *ZONING ORDINANCE* § 5-2-2 (2002), available at <http://www.municode.com>.

¹⁸⁸ *Id.*

¹⁸⁹ DETROIT, MICH., *ZONING ORDINANCE* § 49.0102(D) (2001), available at <http://www.municode.com>.

¹⁹⁰ PENFIELD, N.Y., *ZONING ORDINANCE* § 3-14(A), (F)(1)–(4) (1987) ("Floodplain Protection District"). Relevant provisions are as follows:

A. Purpose

It is hereby found and declared that the unmanaged use of property, the alteration of topography, an excessive filling, channel encroachment or other acts that affect the natural discharge of water through floodplains and constitute a threat to the

M. Ridgeline Protection

Ridgelines and hilltops are valuable for both their scenic and their ecological qualities.¹⁹¹ Surface runoff from ridgeline development can contaminate rivers and streams that supply drinking water downstream.¹⁹² Development of septic systems on ridges and hilltops can cause contamination of lower-lying properties. Buildings can disrupt wildlife corridors and critical habitats. Hillsides and ridgelines are inherently physically unstable, and care must be taken to prevent mudslides and other catastrophic movements of earth.¹⁹³ Local laws can require that development on ridgelines and hilltop areas blend in with the natural environment and be buffered to preserve particularly valuable viewsheds in the community.¹⁹⁴

health, safety and general welfare of the inhabitants of the Town of Penfield and to the economic vitality of the community. The purpose of this section is to . . . prevent loss of property and potential loss of life in the floodprone areas; to preserve the water quality; to minimize expenditures for relief, insurance and flood control projects; and to limit building and development within the areas of special flood hazard.

....

F. Development Standards/Permit Conditions

General Standards. No permit shall be granted for a regulated activity within any of the Floodplain Protection Districts unless the applicant submits a plan certified by a registered professional engineer, which plan shall contain the following evidence that:

1. The structure will be constructed with its lowest floor elevated to at least one (1) foot above the base flood level;
2. The structure will not affect the efficiency or the capacity of the floodway, or increased flood heights;
3. The structure will be placed on the site so as not [to] cause increased velocities or obstruct or otherwise catch or collect debris which will obstruct flow under flood conditions;
4. The structure shall be firmly anchored to prevent flotation, collapse or lateral movement which may result in damage to other structures, restrictions of bridge openings and other narrowings of the watercourse.

Id.

¹⁹¹ See DEBORAH A. MANS, 1999 ZONING AND PLANNING LAW HANDBOOK § 14.01 (1999).

¹⁹² WAPPINGER, N.Y., ZONING LAW § 410-15.2 (1996) ("Hilltops, Ridgelines and Steep Slopes").

¹⁹³ See PITTSBURGH, PA., CODE § 906.04 (2002) ("Landslide Prone Overlay District"), available at <http://www.municode.com>. The City of Pittsburgh has adopted a Landslide Prone Overlay District ("LS-O") to protect against this type of disaster. Within this LS-O, site development must comply with the hillside development standards contained in the city's Subdivision Regulations.

¹⁹⁴ Many ridgeline protection ordinances are designed to accomplish aesthetic objectives and fail to contain standards that protect the important ecological function that ridgelines serve. Land use regulations that are based on both scenic and environmental preservation are more likely to be upheld than those that pursue scenic values alone. For a review of the "growing unease with aesthetic-based regulation" exhibited by certain courts, see Michael Allan Wolf, *Euclid at Threescore Years and Ten: Is This the Twilight of Environmental and Land Use Regulation?*, 30 U. RICH. L. REV. 961, 985-89 (1996).

The town of Castle Rock, Colorado, has adopted a ridgeline protection law that allows certain ridgelines and hilltops to be designated for protection of the visual environments they create. Development permits are then conditioned on keeping buildings and other structures out of sight.¹⁹⁵

The city of Cincinnati adopted a hillside protection ordinance in order to:

to assist the development of land and structures to be compatible with the environment and to protect the quality of the urban environment in those locations where the characteristics of the environment are of significant public value and are vulnerable to damage by development permitted under conventional zoning and building regulations.¹⁹⁶

N. Scenic Resources

Scenic resources include open views, country roads, panoramic landscapes, tree-lined streets, stone walls, and agricultural scenes. Local efforts to preserve scenic resources include the regulation of road construction and maintenance, land-clearing, architecture, and placement of utility lines and signage. Other requirements such as the maintenance of vegetative buffers, street trees, and other vegetation may be included to minimize the impact of development. The town of Somers, New York,

¹⁹⁵ CASTLE ROCK, COLO., CODE ch.17.14.060, No. 99-15 (2002) ("Skyline/Ridgeline Protection Regulations"), available at http://www.ci.castlerock.co.us/town_services/municode/title_17.pdf. The regulation lists specific visual criteria:

C. Mitigation of Impacts. Within . . . minor ridgeline areas of the district, all primary and accessory structures shall be required to comply with the following measures designated to mitigate the visual impact of the structure prior to occupancy, unless explicitly exempted elsewhere in this Chapter.

1. Colors. All occupied structures and accessory structures shall be constructed and maintained so that predominant exterior wall colors . . . and roof surfacing materials (a) repeat the colors most commonly in the land and vegetation around the building (earth tone), and (b) have a light reflective value of no more than forty percent (40%).

2. Vegetation. The area around each primary structure and accessory structure shall include at least one (1) tree of a species with a mature height of at least thirty-five (35) feet for each two thousand five hundred (2,500) square feet of lot or parcel area; provided, however, that this requirement shall not require any single-family residential lot to contain more than eight (8) trees.

Id.

¹⁹⁶ CINCINNATI, OHIO, CODE § 1459-100 (1993), available at <http://www.rcc.org/municode.html>. This ordinance was upheld in *Cash v. Cincinnati Board of Appeals*, 690 N.E.2d 593 (Ohio Ct. App. 1996).

has adopted a local law that contains standards for the designation of scenic resources worthy of protection.¹⁹⁷

O. Steep Slope Protection

Steep slopes usually are associated with other environmental features such as rock outcrops, shallow soils, bedrock fractures, and groundwater seeps. Excavations or building construction can cause instability by loading the slope and removing vital support. Grading, cutting, and filling can compromise the stability of some slopes.¹⁹⁸ Activities such

¹⁹⁷ SOMERS, N.Y., CODE §§ 138-5, 138-8(A), (B)(2), (B)(4), (B)(5) (1990) ("Scenic Resource Protection"). The law lists eligible features and lays out criteria for designating them as scenic resources:

§ 138-5 Types of scenic resources.

The Town Board of the Town of Somers hereby recognizes, identifies and creates the following types of scenic resources and designates them as worthy of protection:

- A. Roadways,
- B. Slopes,
- C. Ridgelines,
- D. Open fields and meadows,
- E. Water's edge,
- F. Cultural places, and
- G. Trees and stands of trees.

§ 138-8 Designation criteria.

A. General characteristics. A scenic resource shall be found to possess one (1) or more of the following general characteristics:

(1) Illustrative of a natural landscape feature, geologic feature or improvement representing the natural character and history of the town.

(2) Possessing a unique overall quality of scenic beauty, scale, texture and form.

B. Specific characteristics. A scenic resource shall be found to have one or more of the following specific characteristics:

....

(2) Slopes.

(a) A rise in elevation providing a focal point of a vista or elements of a panoramic view.

(b) An elevation which because of steepness, geologic structure, water flow or vegetation is aesthetically pleasing.

....

(4) Open fields and meadows.

(a) A large open area where the predominant vegetation consists of herbaceous growth and shrubs that provide a unique and distinct landscape scenery significantly different from the predominant wooded landscape of the town.

(b) The open field or meadow provides a visual link to the agricultural history of the town.

(c) The open field provides an important visual focus for stands of trees, stone walls or fences.

(5) Water's edge.

(a) Reservoirs, ponds, lakes and permanently running streams and brooks that are focal points of vistas or are elements of a panoramic view.

(b) The reservoir, pond, lake or permanently running stream or brook provides a reflective or aesthetically scenic view.

Id.

¹⁹⁸ See MICHAEL J. CLARK & R. JOHN SMALL, SLOPES AND WEATHERING 6, 9 (1982).

as agriculture, road and railway construction, house building, and land drainage can be regulated to protect steep slopes. The town of Cortlandt, New York, has adopted a local law for the purpose of preventing the "improper alteration" of steep slopes.¹⁹⁹ Provisions of this kind can be found in ridgeline or hilltop protection ordinances.²⁰⁰

P. Storm Water Management

Local governments adopt local laws to control the negative impacts of storm water runoff on the environment and to minimize damage to property and public health and safety. Storm water management is the process of controlling and cleansing the excess runoff so it does not harm natural resources or human health. As more land becomes covered with impervious surfaces, such as roads, parking lots, and buildings, there is less surface area available for storm water to infiltrate. Where storm basins do not exist or are not adequate, storm water finds its way to the nearest water body. Impervious surfaces not only increase the volume and velocity of runoff but also prevent the natural processing of nutrients, sediments, and other contaminants. Regulation of storm water runoff through storm water management improves control of floods, reduces erosion and sedimentation, and aids ground water replenishment.²⁰¹

Colorado law permits local governments to adopt regulations limiting development in storm water channels.²⁰² The city of Fitchburg, Massachusetts, adopted a storm water management and erosion control ordinance to prevent and diminish property damage and flooding.²⁰³

¹⁹⁹ CORTLANDT, N.Y., CODE § 259.1 (1992) ("Steep Slope Protection").

²⁰⁰ See *supra* notes 192–193 and accompanying text.

²⁰¹ See N.Y. STATE DEP'T OF ENVTL. CONSERV., NEW YORK STATE STORMWATER MANAGEMENT DESIGN MANUAL ch. 2 (2001), available at <http://www.dec.state.ny.us/website/dow/swmanual/swmanual.html>.

²⁰² See COLO. REV. STAT. § 30-28-111 (1986) ("To the end that adequate safety may be secured, the county planning commission may include in said zoning plan provisions establishing, regulating, and limiting such uses on or along any storm or floodwater runoff channel or basin as such storm or floodwater runoff channel or basin . . ."); COLO. REV. STAT. § 31-23-301 (2001), which states that:

For the purpose of promoting health, safety, morals, or the general welfare of the community, including energy conservation and the promotion of solar energy utilization, the governing body of each municipality is empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces

Id.

²⁰³ FITCHBURG, MASS., CODE § 154-1 (1999) ("Stormwater Management and Erosion Control Ordinance"), available at <http://www.generalcode.com>. This ordinance was adopted to prevent or diminish "property damage, flooding, the contamination of drinking water supplies, the loss of recreational opportunities, adverse impacts on fisheries and wildlife, the loss of wetlands, . . . and the loss of valuable agricultural soils." *Id.* at 51-1.

Q. Timber Harvesting Regulation

The regulation of timber harvesting can help maintain an ecological balance while still meeting present and future demand for lumber and pulp. Some factors considered by local harvesting regulations include the successional role of species regeneration, the effects of competing vegetation, and potential damaging agents such as insects and pathogens. Construction of access roads, timber products processing centers, and other permanent structures in heavily forested areas are important development matters that may be regulated by timber harvesting laws.²⁰⁴ The town of Pawling, New York, adopted a Timber Harvesting Law that regulates tree clearing and harvesting to prevent sedimentation and drainage problems.²⁰⁵

²⁰⁴ See KUSLER, *supra* note 186, at 108; ST. PAUL FIELD OFFICE, U.S. FOREST SERV., NR-604 APPROACHES TO ECOLOGICALLY BASED FOREST MANAGEMENT ON PRIVATE LANDS, part 2 (1997), available at <http://www.na.fs.fed.us/spfo/pubs/misc/ecoforest/p2.htm> (last visited May 1, 2002) (on file with the Harvard Environmental Law Review).

²⁰⁵ PAWLING, N.Y., CODE § 45-2, 45-9 (1993). The town's Timber Harvesting Law includes the following provisions:

§ 45-2 Title and Purpose

It is the purpose of this Chapter to protect the public health, safety, and welfare of the residents of the Town of Pawling by regulating tree clearing and timber harvesting, so as to prevent problems related to erosion, sedimentation, and/or drainage. In relation to this purpose, this Chapter is intended to:

....

(B) Protect people and properties from the adverse effects that can be associated with improper timber harvesting, such as:

- (1) Increased runoff, erosion, and sediment.
- (2) Increased threat to life and property from flooding or stormwaters.
- (3) Increased slope instability and hazards from landslides and slumping.
- (4) Modifications of the groundwater regime that adversely affect wells and surface-water levels.

....

§ 45-9 Permit Standards

....

B. In granting a permit under this Chapter, the standards and considerations taken into account shall include, at a minimum, the following:

(1) Stream Crossings

Every effort shall be made to protect the integrity and quality of all continuously flowing streams. For maximum stream protection, the following practices shall be adhered to:

....

(b) Cross all streams by the most direct route. Choose crossing sites that have low, stable banks, a firm stream bottom, and gentle slopes along the approaches. Avoid crossing at bends or pools. Cross at a few carefully chosen places rather than any place that seems convenient.

(c) Use temporary culverts, bridges, or other erosion control devices where stream bottoms or banks would otherwise be damaged and remove structures after use.

(d) Never skid logs or conduct any other logging activities through any stream with running water.

(2) Harvesting Timber Adjacent to Streams or Water Bodies

(a) For slopes up to 10% keep skidders back at least 50 feet from the stream bank

R. Transfer of Development Rights

New York statutes define the Transfer of Development Rights ("TDR") as "the process by which development rights are transferred from one lot, parcel, or area of land in a sending district to another lot, parcel, or area of land in one or more receiving districts."²⁰⁶ A "sending area" is an area where land conservation is sought, and a "receiving area" is one where development is wanted and can be accommodated. The purpose of a TDR program is to allow communities to develop in a more economical and efficient manner. TDR programs can be used to conserve natural resources, scenic views, and open lands by designating areas containing such resources as sending areas. The city of Falmouth, Massachusetts, used the TDR approach to protect critical coastal and drinking water supply areas.²⁰⁷

and winch off any logs that lie closer to the bank in order to prevent soil disturbance which could start erosion. For slopes over 10%, keep skidders back at least 100 feet; except when doing so will cause greater erosion problems.

(b) Directionally fell trees so that the tops land away from streams.

(c) Remove any logging debris that gets into a flowing stream so stream flow is not affected.

(d) Leave a 50-foot wide buffer strip along both sides of flowing streams, ponds and marshes in order to keep the water shaded and to prevent thermal stress by direct exposure to sunlight.

Id.

²⁰⁶ N.Y. TOWN LAW § 261-a(1)(d) (McKinney Supp. 2001), N.Y. VILLAGE LAW § 7-701(1)(d) (McKinney Supp. 2000), N.Y. GEN. CITY LAW § 20-f(1)(d) (McKinney Supp. 2001).

²⁰⁷ The code of the city of Falmouth, Massachusetts, contains these TDR provisions:

Eligibility: Any lot or lots shown on a plan endorsed by the Planning Board and duly recorded at the Registry of Deeds as of April 1, 1985 shall be eligible for a Special Permit to transfer a portion or all of the development rights on said lot or lots (hereinafter called "donor lots") to a different location and different zoning district (hereinafter called "receiving districts") to be included as part of a subdivision requiring approval under the Subdivision Control Law, provided that the following requirements are met:

1) Each donor lot or portion thereof complies, in all respects, with the minimum requirements for obtaining a Building Permit by right or if in the opinion of the Planning Board, is potentially subdividable lot of land given minimum zoning requirements, subdivision regulations and other pertinent regulations;

2) the locus of the receiving district contains at least five (5) acres in an RA, RB, RC, AGA, or AGB zone and ten (10) acres, if an AGAA or RAA zone; and two (2) acres in a Business or LIA zone.

3) The owner or owners of the donor lot(s) record at the Registry of Deeds a covenant running in favor of the Town of Falmouth, prohibiting the construction or placement of any structure on said donor lot(s)

FALMOUTH, MASS., CODE § 6945 (1984).

[Donor lots shall consist of] [a]ll land within mapped recharge areas of the coastal ponds and public drinking water supplies within the Town of Falmouth referred to in Section 5341, of the Zoning By-laws

A comprehensive plan in the Long Island Pine Barrens allocates development credits to land in the fragile pine barrens aquifer, based on the development yield of that land under local zoning, and greatly restricts development in these sending districts.²⁰⁸ The plan establishes receiving districts into which these development credits may be transferred. Developers who own land in these receiving districts may purchase credits from landowners in sending districts. Each purchased credit allows the developer to build one additional housing unit over the number permitted by the receiving district's zoning.

Another interesting approach to using TDR is illustrated by Connecticut's "Right to Farm Statute," which pursues the twin objectives of protecting farming and preserving open space.²⁰⁹ This statute promotes active farming by discouraging development on prime farmland. The state buys development rights to farmland that the Commissioner of Agriculture deems worth preserving according to statutory criteria designed to contribute to the preservation of agriculture.²¹⁰ Municipalities have authority to purchase farmland development rights as well.²¹¹ The purchase of development rights on agricultural land thus provides cash to farmers as an incentive for them to continue to farm. Connecticut statutes provide an additional inducement to sell the development rights to valuable agricultural land. Farmers who have sold their development rights have their real property tax assessments based not on the value of farmland for uses permitted under local zoning, but on the land's value

Id. § 6950(2).

Receiving districts shall consist of all land currently zoned RB, AGB, RA, AGA, RAA, and AGAA, BS, B2, LIA, RC except that receiving districts shall not be considered to include any land with a mapped Water Resource Protection District as defined . . . [or] any land within a mapped water recharge area as referred to in Section 5341, of the Zoning By-law

Receiving districts shall be eligible to "accept" donor lots according to the schedule of Section 6960, provided that the locus of the receiving district is the subject of a subdivision plan requiring Planning Board approval under the requirements of MeGeLe, Ch. 41 and a Special Permit under the requirements of Section 6100, of the Zoning By-laws, except that Section 6121 shall not apply to plans filed under this Section. No transfer of development rights shall be approved by the Planning Board into a receiving district locus not requiring subdivision approval.

In transferring development rights into a receiving district, the Planning Board may allow the minimum frontage, width and area standards of the total subdivision, including transferable lot rights to be reduced according to the criteria in Section 6120.

Id. § 6955.

²⁰⁸ Central Pine Barrens (N.Y.) Joint Planning and Policy Comm'n, Central Pine Barrens Comprehensive Land Use Plan, ch. 6 (June 28, 1995), at http://pb.state.ny.us/cpb_plan/chapter_6.htm (on file with the Harvard Environmental Law Review).

²⁰⁹ CONN. GEN. STAT. § 22-26aa (2001).

²¹⁰ *Id.* § 22-26cc.

²¹¹ *Id.* § 7-131q.

as a farm.²¹² After the development rights are sold, the land can only be used or sold for farming purposes; this reduced market value, when reflected in reduced tax assessments, lowers the farmer's annual operating expenses, making farming more economically viable.

S. Tree Preservation

Tree preservation ordinances typically establish a permit system under which tree removal is allowed, but only upon a showing of necessity and compliance with certain conditions, such as the replacement of some or all of the trees to be removed. Tree preservation ordinances may consider views, pruning, trimming, and setbacks from curbs, sidewalks, and street intersections. A number of states, including Georgia,²¹³ Hawaii,²¹⁴ Maine,²¹⁵ and Maryland,²¹⁶ have adopted statutes that either require or permit local governments to adopt tree preservation laws.

The town of Cheshire, Connecticut, has adopted such an ordinance.²¹⁷ Some communities have adopted ordinances to protect native tree species, or "heritage trees," such as oak, sycamore, walnut, and eucalyptus, which require reports by professional arborists and practices to be followed to preserve such specimens from development activities, including additions to single-family homes.²¹⁸ Steamboat Springs, Colorado, has adopted a Trees and Shrubs Ordinance. The purpose of this local law is to prescribe requirements "for the protection of plants, including . . . trees, shrubs, lawns, and all other landscaping located, standing, or growing within or upon city property, including . . . any city-owned street, alley, right-of-way, or other public place or city or mountain park, recreation area, or open space."²¹⁹

²¹² *Id.* § 12-63.

²¹³ GA. CODE ANN. § 12-2-8(h)(8) (2001) (requiring local governments to require tree-replacement plans when building permits are issued for commercial construction in protected mountain areas).

²¹⁴ HAW. REV. STAT. §§ 58-1 to 58-5 (2001) (requiring counties to enact ordinances that protect "exceptional trees").

²¹⁵ ME. REV. STAT. § 38.439-A(5) (2001) (requiring municipalities to impose mandatory minimum standards in regulating timber harvesting in shoreland areas).

²¹⁶ MD. CODE ANN., NAT. RES. I § 5-1603 (2000) (requiring local governments with planning authority to adopt forest conservation programs that meet minimum state guidelines).

²¹⁷ CHESHIRE, CONN., ZONING REGS. ch. 44, art. a, § 10 (1993) ("Planned Residential Subdivision Development"). In an effort to prevent erosion, to maintain the ecological balance, to provide for protection from the sun and wind, and to protect and enhance the general welfare, all mature trees should be retained on the site to the greatest extent possible; and all existing, mature vegetation on the site shall be retained in areas not disturbed by construction. In areas which are disturbed, or where vegetation is sparse, specific and strict requirements are outlined for the planting of new material. *Id.*

²¹⁸ See Todd S. Purdum, *The (Almost) Untouchables of California*, N.Y. TIMES, Aug. 29, 2001, at A1.

²¹⁹ STEAMBOAT SPRINGS, COLO., CODE § 24-1 (2002), available at <http://www.municode.com>.

T. Wetlands and Watercourse Protection

Local wetlands regulations restrict activities such as dredging and soil disposal, construction of roads, grading and soil removal, timber harvesting, and placement of buildings and infrastructure on wetlands and their buffer areas. The town of Lewisboro, New York, has adopted a local wetlands and watercourse law that contains extensive protections for these resources.²²⁰ The city of Concord, New Hampshire, has created a Shoreline Protection District to maintain the quality of surface waters and groundwater, retain flood storage properties, protect wildlife habitat and feeding areas, and protect other unique natural resources.²²¹ In Connecticut, state law defines a wetland as an area containing soil types "designated as poorly drained, very poorly drained, alluvial, and flood plain by the National Cooperative Soils Survey, as may be amended from time to time, of the Natural Resources Conservation Service of the United States Department of Agriculture."²²² A watercourse includes any body of water, whether natural or artificial, and whether privately or publicly owned.

Connecticut's Inland Wetlands and Watercourses Act requires all municipalities to establish an inland wetlands agency.²²³ The agency regulates activities within wetlands designated by the municipalities. A local wetlands agency has the right to regulate not only the land within the established boundaries of a wetland or watercourse, but also any ad-

²²⁰ LEWISBORO, N.Y., CODE § 217-1(A) (1999). The town's Wetlands and Watercourses Law states the following:

A. Findings of Fact.

(1) In their natural state, wetlands and watercourses are valuable natural resources and serve multiple functions, including: Protecting water resources by providing sources of surface water, recharging groundwater and aquifers, serving as chemical and biological oxidation basins and/or functioning as settling basins for naturally occurring sedimentation; controlling flooding and stormwater runoff by storing or regulating natural flows; and providing unique vegetative associations specifically adapted for survival in low oxygen environments

B. Intent

It is the intent of the Town of Lewisboro that activities in and around wetlands and watercourses conform to all applicable building codes, sediment control regulations and other regulations and that such activities not threaten public safety or the natural environment and implement the findings of fact set forth in Subsection A or cause a nuisance.

Regulated Activities:

(1) Placement or construction of any structure, driveway, or roadway;

. . . .

(5) Introduction of any form of pollution, including but not limited to the installation of a septic tank or fields, the running of a sewer outfall, or the discharging of sewage treatment effluent or other liquid wastes into, or so as to drain into, a wetland or watercourse.

Id.

²²¹ CONCORD, N.H., CODE ch. 28-3-3 (2002), available at <http://www.municode.com>.

²²² CONN. GEN. STAT. § 22a-38(15) (2001).

²²³ *Id.* §§ 22a-36 to 22a-45.

jacent area where activities might occur that would "use" the wetlands in a prohibited manner.²²⁴ The Act prohibits anyone from conducting a "regulated activity" on any inland wetland or watercourse without a permit. Regulated activities include almost all development and land use activities.²²⁵ The Commissioner of the State Department of Environmental Protection ("DEP") may revoke the local wetlands agency's authority to regulate activity in the wetlands if the DEP determines that the local agency has failed to perform its duties.²²⁶ The Commissioner's regulations require that local agencies report to the DEP all permits issued and any other action they have taken.²²⁷ Local wetlands agencies are given the authority to adopt regulations that expand on the Commissioner's regulations, or to add to them if necessary to protect the wetlands.²²⁸

VI. IN PRAISE OF PAROCHIALISM

In the mid-1990s, the Yale Center for Environmental Law and Policy critically reviewed national environmental policies. The Center initiated the Next Generation Project, through which it engaged Yale students, state and national leaders, experts from the private and non-governmental sectors, and a host of others in a comprehensive evaluation of the country's environmental problems, policies, and programs.²²⁹ Yale conducted two major conferences, involved dozens of students in research projects, and conducted fourteen workshops engaging hundreds of experts.

An impressive number of critical observations and recommendations are contained in the Next Generation Project's report, several of which bear on local environmental law and its place in the panoply of the nation's environmental initiatives.²³⁰ The report states that there is broad public support for environmental protection, if not for environmental spending. First-generation command-and-control laws, adopted by Congress during the 1970s and 1980s, address the clear public concerns of how to clean up the sky and water by seeking to eliminate serious pollution from point sources such as smokestacks and water pipes. Today's environmental problems, however, include the loss of natural resources to suburbanization and the effects on water and air quality of the development of thousands of small parcels of land.²³¹ The prospects of remedying these problems through the apparatus created under existing federal and

²²⁴ *Aaron v. Conservation Comm'n of Redding*, 441 A.2d 30, 38 n.17 (Conn. 1981).

²²⁵ CONN. GEN. STAT. § 22a-42(a) (2001).

²²⁶ *Id.* § 22a-42(d).

²²⁷ *Id.* § 22a-39(m); CONN. AGENCIES REGS. §§ 22a-39-11.1, 22a-39-11.8 (1997).

²²⁸ CONN. GEN. STAT. § 22a-39(f) (2001).

²²⁹ The results of this two-year effort were published in *THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY* (Marian R. Chertow & Daniel C. Esty eds., 1997).

²³⁰ *See id.* at 5-6, 7-8, 10.

²³¹ *See id.* at 2.

state laws are limited. The key policy question is how to move from the first-generation command-and-control approach to a new strategy that can be translated into action plans for government and the private sector.

The Yale report contains several principles to guide policy makers toward answers to this question of how to proceed.²³² It suggests that next-generation strategies should be cooperative, not confrontational; comprehensive, not fragmented; and flexibly tailored to local contexts, rather than constrained by a “one-size-fits-all” approach. The report emphasizes that today’s environmental problems are everyone’s business, since all of us are affected by, and most of us are in some direct way involved in, the thousands of decisions and actions that affect environmental quality. Environmental decision-making, in this context, needs to devolve to include local leaders and citizens while continuing to engage state and federal advocates, lawmakers, and administrators. The report mentions the importance in modern civil society of engaging the energy and wisdom of a wide range of civic organizations and recognizes the important role they must play in the environmental domain.²³³ One of the report’s most salient, and mystifying, observations is that in the first generation of environmental policies there has been a systemic disconnect between environmental policy and land use decision-making.²³⁴ Environmental policy is the creature of federal and state law and rulemaking, while land use decisions are local, for the most part. Environmental policy-makers have proceeded as if these two realms were entirely disconnected. The report states:

Land use is the forgotten agenda of the environmental movement. In the past twenty-five years, the nation’s many environmental laws addressed one problem at a time—air or water pollution, endangered species, waste disposal—and they have done it primarily through prohibitive policies that restrict private behavior. Although their achievements have been significant, such policies seem to offer diminishing returns. Environmental progress in the next generation will increasingly depend on stemming the environmental costs of current land use patterns.²³⁵

Environmental progress and land use decision-making are two sides of the same coin, according to the report.²³⁶ Environmental policy can be only marginally successful if the cumulative effects of local land use decisions are ignored. The report lists the shortcomings of the land use

²³² *Id.*

²³³ *See id.* at 13.

²³⁴ JOHN TURNER & JASON RYLANDER, *Land Use: The Forgotten Agenda*, in THINKING ECOLOGICALLY, *supra* note 229, at 60, 60–66.

²³⁵ *Id.* at 61.

²³⁶ *Id.*

regulatory process: it is too narrowly focused, parochial in effect, based on inadequate information, and alienating to the citizens (and even the responsible officials) who fail to understand it. These flaws can be addressed through long-term planning that is based on ecological systems: watersheds, landscapes, bio-regions, and estuaries. Development policies should consider the carrying capacity of the land and avoid the degradation of critical environmental resources. Since environmental resources cross municipal boundaries, this planning must be intermunicipal in nature. Since broad-based interests are affected and involved, this planning must be collaborative and inclusive. Land planning involves community visioning, and without significant citizen input, it cannot hope to succeed. The tremendous public interest in the environment has not been invested in land use planning, but in lobbying at the national and state level. At the local level, citizens form and fund land trusts whose laudable objective of protecting individual parcels of land misses the opportunity to work on the root causes of environmental degradation. Local citizens and officials need technological assistance to measure the effects of land use decisions, to conduct cost-benefit analyses of local policies, and to inventory critical environmental assets that need to be protected from development pressures.

The empowerment of local governments to adopt local environmental laws addresses a number of the issues raised by the Yale study. While, as the report points out, local citizens may have difficulty understanding the relevance of land use regulation to the quality of their lives, they have no such problem becoming engaged in regulatory efforts to protect the environment. This engagement will help them learn how land use controls can create favorable development patterns, ones that not only preserve environmental assets, but that create jobs, build healthy tax bases, provide needed houses for workers and the retired, and create densities that support alternatives to car-dependent living. In this way, land use practice and environmental policy can become connected. By planning where the environment must be preserved, citizens determine where development should occur. This message can reduce the ambiguity experienced, and the litigation brought, by landowners and developers who do not know why they run into opposition everywhere they try to build.

Engaging local citizens and officials in the adoption of local environmental laws requires long-term planning to identify and prioritize critical environmental areas and assets. This engagement will increase local interest in geographical information technology and will encourage state and federal agencies to provide assistance to local governments to purchase and apply such technology. Sound regulatory approaches to environmental conservation reduce the costs of cleanup, the external costs of environmental degradation, and the costs to society of overzealous opposition to development. Such approaches also reduce the cost of land acquisition programs carried out by land trusts and governmental agen-

cies. Since it is easy to understand that watersheds, landscapes, and other ecological resources transcend municipal boundaries, local environmental advocates are quick to understand the value of intermunicipal planning, a missing ingredient in most local land use planning. For local governments to conduct proper planning, especially across municipal lines, requires incentives and assistance from higher levels of government. As state and federal agencies provide this type of support, the environmental and land use regimes of all levels of government become interconnected.

Local environmental regulations address this generation's environmental problems, those associated with the diffuse, diverse, and very local causes of water and air pollution in the twenty-first century: sprawling development patterns, traffic congestion, and the high cost of development. Local responses are inherently flexible and context-specific. Recognizing the importance of local governments in environmental protection allows them to become useful partners in the state and federal environmental protection systems and encourages the integration of approaches rather than perpetuating fragmentation. Because citizens at the local level are directly affected by environmental problems and have a great stake in the success of efforts at every level of government, there is a strong incentive to resolve land use and environmental problems collaboratively, rather than confrontationally.

VII. CONCLUSION

Since the defeat of the National Land Use Planning Act in the early 1970s,²³⁷ federal energies have been directed toward the creation of technology-based environmental standards and their implementation through cooperative ventures with state governments, with the threat of preemption or financial penalty as the spur to state "cooperation." The most recent manifestation of this policy is seen in the effort by EPA to implement the Total Maximum Daily Load ("TMDL") program.²³⁸ Because of the cost and complexity of achieving its objectives, the TMDL drama will continue to play out for a number of years. While it does, there may be an opportunity at both the state and federal level to strengthen the capacity of local governments to play a productive role in preserving the environment. The advent of a body of local environmental law recommends a fresh look at the merits of offering municipalities a partnership role in state and federal land use and environmental strategies.

States can review the authority they have delegated to local governments regarding land use and environmental protection and consider

²³⁷ See Nolon, *supra* note 5.

²³⁸ See Bruninga, *supra* note 16 and accompanying text; *American Wildlands v. Browner*, 260 F.3d 1192, 1198 (10th Cir. 2001); see also *supra* text accompanying note 18.

whether to increase local authority following any of several approaches described in this Article. States can also draft model local environmental laws for localities to consider. They can provide technical assistance to municipalities regarding the adoption and enforcement of these models and sponsor educational programs to encourage more local governments to become involved. States can also provide bonus eligibility points for discretionary grant programs to local governments that have adopted local environmental laws.

The federal government can encourage more states to delegate authority to protect natural resources to local government by sponsoring the preparation of a model state act that enables municipalities to adopt local environmental laws or by endorsing those promulgated by the APA's Growing Smart Project. It was the model act promulgated by the Department of Commerce in the 1920s that led to the rather rapid adoption of state zoning enabling acts and of local zoning ordinances.²³⁹ Providing federal funding to support the emerging efforts of states to prepare smart growth policies and plans would help create a framework for state and local action to protect environmental resources in critical areas. Federal and state funding also can be provided for the identification of critical watersheds, habitats, and forests and the development of local inventories of natural resources. With federal support, states can encourage local governments to create natural resource inventories and protect critical environmental assets by providing financial incentives to localities that comply with state smart growth programs. Federal and state incentives can also be provided to facilitate efforts to link transportation planning with intermunicipal land use planning.

The premise for this type of activity at the federal and state level is that local authority in land use control must become a fixture of environmental policy in general. This premise is often challenged because its corollary is thought to be the surrender of control over the creation and enforcement of effective standards. This corollary is frightening to those who believe that voluntary approaches to compliance with environmental standards are doomed to fail. There may be other dangers in these efforts, resulting from the limited administrative and enforcement capacity and parochial tendencies of local governments. These can be addressed by effective technical assistance and the centralization of some administrative and enforcement functions at the county, regional, or state level, clear regional policies, and state monitoring of local performance, backed up by financial incentives.²⁴⁰

²³⁹ See ZONING AND THE AMERICAN DREAM, *supra* note 21, at 1.

²⁴⁰ The dangers of relying on the local control of land use have been well documented. See *supra* note 19. Despite the criticism of localism, effective strategies to preempt or direct local land use decisions have been slow to materialize. Fifteen years of regulatory takings cases have not clearly defined nor carefully protected property rights from local land use regulation. New Jersey's aggressive fair share housing policy has not been emu-

This Article has described an American system of environmental and land use law that simultaneously relies on local discretion while attempting management of that discretion from the top. The nation has rejected greater centralization of land use decision making at the federal level that would establish and enforce standards to address the environmental impacts of locally adopted development because of the country's strong commitment to local control. A truly decentralized system of environmental enforcement in which state and local governments make and enforce environmental laws that influence local behavior has also been rejected because of documented biases and limitations at these levels. This suggests that the nation must succeed in using a dual approach that seeks better and more efficient ways of blending local, state, and federal influences on the land.

One of the lessons learned from examining the wide variety of adopted local environmental laws is how varied local environmental conditions are. The diversity of local conditions such as climate, terrain, hydrology, and biodiversity, suggests that centralized approaches to environmental protection are not necessarily desirable when dealing with environmental problems. By supporting innovation at the local level, citizens are encouraged to determine for themselves what is acceptable in their communities. Their local environmental laws will define the linkages between what is built and what is natural and the separations needed between the two. By codifying environmental expectations in local law, today's citizens will establish and pass along their understanding of environmental protection through the local development patterns and the preserved landscapes that their laws create.

Federal and state efforts to encourage local protection of natural resources and other smart growth initiatives should be seen as a strategic effort to build the capacity of local governments, their permanent partners in land use control and environmental protection. This capacity-building approach can complement federal efforts to enforce environmental standards by building and reinforcing the state and local implementation infrastructure. This capacity is needed, not just for the TMDL program, but to carry out a host of federal initiatives to control nonpoint source pollution, achieve sound transportation planning, preserve threatened species, and combat the ill effects of sprawl.

The recent evidence of innovation in environmental protection occurring at the local level should not be surprising. The common law was initially created by local customs and local courts and discovered and applied at higher levels of the judicial order to create a body of law capa-

lated in more than one or two states. Regional and statewide land use planning has not emerged in most states to effectively constrain or guide local land use planning. A series of reform movements—growth management, sustainable development, and smart growth—have failed to dictate the outcomes of local land use disputes in most states.

ble of knitting a nation together with common legal rules and traditions.²⁴¹ The emergence of local environmental law indicates that environmental values are being accepted at the base of the democratic system and being balanced with economic realities. This is a healthy trend and one that deserves to be encouraged.²⁴²

It should not be surprising that a critical and needed legal innovation is emerging at the grassroots level. That the authority of local governments to regulate the use of privately owned land can be expanded to meet the challenges of changing times has never been in doubt. At the inception of the modern period of land use controls, the U.S. Supreme Court stated: "[W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise."²⁴³

²⁴¹ See WINSTON S. CHURCHILL, A HISTORY OF THE ENGLISH-SPEAKING PEOPLES: THE BIRTH OF BRITAIN 224-25 (1956).

²⁴² "Local governments are the last direct contact that the average citizen has with the idea of government; it is the only place where the citizen still feels that his individual participation might make a difference." Jan Z. Kransnowiecki, *Abolish Zoning*, 31 SYRACUSE L. REV. 719, 722 (1980).

²⁴³ *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).