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Consolidated Planning Boards: Valid and Valuable—A Reply to Albert Pirro

Philip Weinberg*

Will Rogers reportedly once said, “land . . . they make so little of it nowadays.” We in New York have to use wisely what we have. And consolidated planning boards, encouraging local governments to cooperate in land-use concerns, are a major step forward in accomplishing this.¹

It is ironic that Albert J. Pirro, Jr., a highly respected land use lawyer, commences his attack on the constitutionality of consolidated planning boards² with a quote from *McCulloch v. Maryland*.³ That landmark decision by Chief Justice John Marshall sustained a broad reading of governmental power, holding that “a government, entrusted with . . . ample powers, . . . must also be entrusted with ample means for their execution.”⁴ And that, ultimately, is at the root of why the courts are likely to uphold the validity of consolidated planning boards.

In enacting the statutes Mr. Pirro contends are invalid, the Legislature made clear its intent that municipal governments should have “express statutory authority . . . to enter into agreements to undertake comprehensive planning and land use regulation,” to foster “more efficient use of infrastructure and municipal revenues, as well as the enhanced protection of community resources, especially where such resources span municipi-

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1. See N.Y. GEN. CITY LAW § 20-g (McKinney Supp. 1997); N.Y. TOWN LAW § 284 (McKinney Supp. 1997); N.Y. VILLAGE LAW § 7-741 (McKinney 1996).

2. See Albert J. Pirro, Jr., *The Unconstitutionality of Consolidated Planning Boards: Interlocal Planning Under New York Law*, 16 PACE L. REV. 477 (1996).

3. 17 U.S. (4 Wheat.) 316, 405 (1819).

4. *Id.* at 408.

pal boundaries.”⁵ It is surely late in the day to claim the Legislature lacked authority under its police power—“the least limitable of all the powers of government”⁶—to take this step. And, it should be noted, the statutes under attack did no more than reaffirm a power that municipalities have long had to cooperate voluntarily in planning.⁷

This legislation stemmed from a thorough statewide study by the State Joint Legislative Commission on Rural Resources. The Commission held conferences and public hearings at which “[p]articipants repeatedly stressed the inability of many small local governments acting individually to protect and enhance their communities through comprehensive planning and land use regulation and development or to protect community and natural resources that span municipal boundaries.”⁸ Its legislative sponsor noted that the statute “provided a basic structure for initiating cooperative zoning and planning efforts, while preserving maximum flexibility for local governments to develop specific local approaches to coordination and joint service delivery.”⁹ The sponsor expressly pointed to the “concern over the fragmentation and relative isolation of land use decisions made by individual local governments”¹⁰—a concern repeatedly voiced as municipalities in New York continue to determine land-use issues, such as traffic and water supply, with impacts far beyond their borders. The Department of State, in supporting the legislation, likewise noted that “the measure recognizes that community and natural resources often involve several municipalities, [which] should be encouraged to develop joint plans to

5. N.Y. GEN. CITY LAW § 20-g(1) (McKinney Supp. 1997); N.Y. TOWN LAW § 284(1) (McKinney Supp. 1997); N.Y. VILLAGE LAW § 7-741(1) (McKinney 1996).

6. *Engelsher v. Jacobs*, 5 N.Y.2d 370, 373, 157 N.E.2d 626, 627, 184 N.Y.S.2d 640, 642, *cert. denied*, 360 U.S. 902 (1959).

7. See N.Y. GEN. MUN. LAW §§ 119-m to 119-oo (McKinney 1986 & Supp. 1997) (authorizing municipal cooperation in planning and other activities); N.Y. GEN. MUN. LAW § 239-n (McKinney 1986 & Supp. 1997) (authorizing local governments to create intergovernmental relations councils for, *inter alia*, “intercommunity planning”).

8. Memorandum of Assem. William Magee, reprinted in [1992] N.Y. LEGIS. ANN. 454. See also John R. Nolon, *Comprehensive Land-Use Planning: Learning How and Where to Grow*, 13 PACE L. REV. 351 (1993).

9. Magee, *supra* note 8, at 454-55.

10. Letter of Assem. William Magee to Counsel to Gov., July 23, 1992 (N.Y.S. 7181-A, N.Y.A. 9805-A, 215th Sess.) (Legis. Bill Jacket at 5).

address preservation and development.”¹¹ The New York State Conference of Mayors and Municipal Officials supported the legislation since it “benefits municipalities, developers, and the resident[s] of cities [across] the State.”¹² Similarly, the Association of Towns of the State of New York noted that the legislation furnishes “opportunities for cooperation” that “may result in important savings and economies in the operation of local government.”¹³

The Court of Appeals has recognized the need for land-use planning and regulation at a broader level than that of individual local governments. In its landmark decision in *Golden v. Town of Ramapo*,¹⁴ the court noted:

Undoubtedly, current zoning enabling legislation is burdened by the largely antiquated notion which deigns that the regulation of land use and development is uniquely a function of local government—that the public interest of the State is exhausted once its political subdivisions have been delegated the authority to zone. While such jurisdictional allocations may well have been consistent with formerly prevailing conditions and assumptions, questions of broader public interest have commonly been ignored.¹⁵

The court urged that “[s]tate-wide or regional control of planning would insure that interests broader than that of the municipality underlie various land use policies.”¹⁶ This legislation constitutes a significant step toward that goal.

The Equal Protection Claim

The suggestion that a consolidated planning board violates the one person, one vote principle because it “divests the power

11. Memorandum of Dept. of State to Counsel to Gov., July 7, 1992 (N.Y.A. 9805-A, 215th Sess.) (Legis. Bill Jacket at 10, 11).

12. Letter of Edward C. Farrell, Exec. Dir., N.Y.S. Conf. of Mayors and Municipal Officials to Counsel to Gov., June 30, 1992 (N.Y.A. 9805-A, 215th Sess.) (Legis. Bill Jacket at 12).

13. Letter of G. Jeffrey Haber, Exec. Sec., Ass'n of Towns of the State of New York, June 30, 1992 (N.Y.A. 9805-A, 215th Sess.) (Legis. Bill Jacket at 20). The State Legislative Commission on Rural Resources also favored the bill. See *id.* at 14.

14. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

15. *Id.* at 374, 285 N.E.2d at 299, 334 N.Y.S.2d at 148-49 (citations omitted).

16. *Id.* at 376, 285 N.E.2d at 300, 334 N.Y.S.2d at 150.

each autonomous municipality enjoys¹⁷ is mistaken. Municipal governments are creatures of the State and not “persons” who may assert rights under the Fourteenth Amendment.¹⁸ As for the rights of their citizens, the author himself notes that the one person, one vote rule does not apply to appointed officers¹⁹—nor could it, since no vote of citizens is involved. Instead, he argues, equal protection is denied where officials of one town may affect land use in another.²⁰ But the courts have consistently upheld provisions for consolidated government decision-making as against one person, one vote claims. In *Sailors v. Board of Education*²¹ the Supreme Court sustained the appointment of county school board members where each local school board named a delegate who voted for the county school board’s members.²² The county school board set policy for boards within the county, just as consolidated planning boards plan for the entire area. In language apt here, the Court noted, “[v]iable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation.”²³

Even more on point is *Education/Instruccion, Inc. v. Moore*,²⁴ rejecting a one person, one vote contention as inapplicable to Connecticut’s Capitol Regional Council of Governments, an agency consisting of the chief elected officers of towns in the Hartford area, empowered to draft development plans and propose (though not adopt) zoning changes.²⁵

17. Pirro, *supra* note 2, at 482.

18. See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907); *South Macomb Disposal Auth. v. Washington Township*, 790 F.2d 500 (6th Cir. 1986).

19. See Pirro, *supra* note 2, at 484 n.35 (citing *Sailors v. Board of Educ.*, 387 U.S. 105 (1967)).

20. See Pirro, *supra* note 2, at 484 n.35.

21. 387 U.S. 105 (1967).

22. See *id.*

23. *Id.* at 110-11. Indeed, the Supreme Court has gone so far as to sustain a state law authorizing cities to exercise their police and sanitary jurisdiction over persons residing up to three miles beyond the city’s borders, rejecting a one person, one vote claim. See *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978).

24. 379 F. Supp. 1160 (D. Conn. 1973), *aff’d*, 503 F.2d 1187 (2d Cir. 1974), *cert. denied*, 419 U.S. 1109 (1975).

25. See *id.*

The author relies heavily on *Board of Estimate v. Morris*,²⁶ in which the Supreme Court ruled the former Board of Estimate of the City of New York had run afoul of the one person, one vote rule.²⁷ But the Board of Estimate consisted of elected (not appointed) officials under a scheme giving the Borough President of Staten Island a vote equal to that of the Borough President of Queens,²⁸ though Queens has four times Staten Island's population.²⁹ And the Board served as a virtual upper house of the City's legislature, with power over not just zoning but property taxes and the voting of the City's capital and expense budgets.³⁰ These differences render *Morris* totally distinguishable.

In any event the one person, one vote decisions turn on the fact that voting is deemed a fundamental right under the Constitution, so that laws restricting the vote are subject to strict scrutiny.³¹ Nothing of that sort is involved here.

The further argument that consolidated planning boards violate equal protection³² because of the New York Constitution's provision that local government officers be "elected by the people of the local government"³³ is inaccurate since joint planning board members are not town officers within the meaning of that provision. Town planning board members are likewise not elected in New York.³⁴ In any event the very next clause of the Constitution states that "[l]ocal governments shall have the power to agree, as authorized by act of the legislature, with . . . other governments within or without the State, to provide cooperatively, jointly or by contract any . . . service, activity or undertaking . . ." ³⁵ Finally, a violation of the State Constitution's home-rule provisions,³⁶ even were it shown, would not translate into a denial of equal protection.

26. 489 U.S. 688 (1989).

27. *See id.*

28. *See id.* at 694.

29. *See id.* at 700 n.7.

30. *See id.* at 694-96.

31. *See Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

32. *See Pirro, supra* note 2, at 487.

33. N.Y. CONST. art. IX, § 1, cl. b, *quoted in Pirro, supra* note 2, at 488.

34. *See* N.Y. TOWN LAW § 20 (McKinney 1987).

35. N.Y. CONST. art. IX, § 1, cl. c.

36. *See* N.Y. CONST. art. IX, § 2.

Due Process

The author's due process contentions³⁷ amount to an attempt to find a denial of substantive due process in statutes regulating economic concerns—a trail the courts have rejected consistently for decades. Substantive due process claims are subject to a strong presumption of constitutionality, and “the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.”³⁸ In New York one must prove the unconstitutionality of such a statute “beyond a reasonable doubt.”³⁹

The suggestion that consolidated planning boards deny due process because they violate home rule is puzzling.⁴⁰ A violation of New York's home-rule provisions⁴¹ does not equal a denial of due process. And it is difficult to discern any home-rule violation on the part of a statute specifically authorized, as noted earlier, by the Constitution's grant of power to local governments to agree with other local governments to provide jointly, if they so choose, for any “service, activity or undertaking”⁴²

The Legislature has determined that cooperative planning is a matter of State concern, by expressly providing that “[b]y the enactment of this section the legislature seeks to promote intergovernmental cooperation [for] comprehensive planning and land use regulation”⁴³ Under basic principles, legislation on an issue found to be of state concern does not violate

37. See Pirro, *supra* note 2, at 489-501.

38. *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 83 (1978) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)).

39. *A.E. Nettleton Co. v. Diamond*, 27 N.Y.2d 182, 193, 264 N.E.2d 118, 123, 315 N.Y.S.2d 625, 633 (1970), *appeal dismissed sub nom.*, *Reptile Products Ass'n v. Diamond*, 401 U.S. 969 (1971).

40. See Pirro, *supra* note 2, at 490-94.

41. See generally N.Y. MUN. HOME RULE LAW §§ 1-59 (McKinney 1994 & Supp. 1997).

42. N.Y. CONST. art. IX, § 1, cl. c. See *supra* note 35 and accompanying text.

43. N.Y. GEN. CITY LAW § 20-g(1) (McKinney Supp. 1997); N.Y. TOWN LAW § 284(1) (McKinney Supp. 1997); N.Y. VILLAGE LAW § 7-741(1) (McKinney 1996). One expert in land-use law has pointed to added benefits of consolidated planning boards, including cost savings through shared enforcement and use of consultants, joint training for staff, and added opportunities for economic development. See PATRICIA E. SALKIN, *INTERMUNICIPAL COOPERATION IN LAND USE PLANNING*, GOVERNMENT LAW CTR. OF ALBANY LAW SCH. (1994).

New York's home-rule provisions. The courts have so held with regard to State regulation of docks and wharves on Lake George, "even when the legislation has a ' . . . direct effect on the most basic of local interests . . .'"⁴⁴ Likewise, state legislation controlling solid waste disposal on Long Island is of state concern even though it bars landfills on town property.⁴⁵

It is beyond dispute that land-use planning is such an issue of state concern, as Mr. Pirro acknowledges in referring to *Golden v. Town of Ramapo*.⁴⁶ The lack of state legislation decried by the Court of Appeals in *Golden* over two decades ago has now been partially cured. Other states such as Vermont,⁴⁷ Maine⁴⁸ and Hawaii⁴⁹ have gone further and enacted statewide land-use controls. It is anachronistic to contend that home rule prevents the Legislature from authorizing towns to cooperate in this area, especially when other states have enacted controls at the state level. The statutes challenged here amount to a recognition that localities are often interdependent, with development in one town affecting the traffic, water supply and the like of its neighbors, and some localities luring major developments to augment their tax base while others shun it on equally parochial grounds, despite the impacts on other communities. Just as Clemenceau observed that war is too important to leave to the generals, the Legislature is authorized to permit towns to

44. *Salvador v. State*, 205 A.D.2d 194, 199, 618 N.Y.S.2d 142, 144 (3d Dep't 1994), *appeal dismissed*, 85 N.Y.2d 857, 648 N.E.2d 795, 624 N.Y.S.2d 375, *leave to appeal denied*, 85 N.Y.2d 810, 653 N.E.2d 620, 629 N.Y.S.2d 724 (1995) (citing *In re Town of Islip v. Cuomo*, 64 N.Y.2d 50, 57, 473 N.E.2d 756, 760, 484 N.Y.S.2d 528, 532 (1984), quoting *In re Board of Educ. v. City of New York*, 41 N.Y.2d 535, 542, 362 N.E.2d 948, 954, 394 N.Y.S.2d 148, 154 (1977)).

45. See *In re Town of Islip*, 64 N.Y.2d at 56-57, 473 N.E.2d at 760, 484 N.Y.S.2d at 532. See also *Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372, 546 N.E.2d 920, 547 N.Y.S.2d 627 (1989) (state law preempts town impact fee charging developers for road improvements).

46. 30 N.Y.2d 359, 285 N.E.2d 291, 547 N.Y.S.2d 627, *appeal dismissed*, 409 U.S. 1003 (1972). See *supra* text accompanying notes 14-16. See Pirro, *supra* note 2, at 490-91.

47. See VT. STAT. ANN. tit. 24, §§ 4341-4351 (1992) (regional planning boards); tit. 10, §§ 6001-6008 (1993 & Supp. 1995) (state planning boards). See *Southview Assoc., Ltd. v. Bongartz*, 980 F.2d 84 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993) (upholding VT. STAT. ANN. tit. 10, § 6001-6008 (1984 & Supp. 1991)).

48. See ME. REV. STAT. ANN. tit. 30-A, §§ 2321-2342 (West 1996).

49. See HAW. REV. STAT. §§ 205-1 to 205-18 (1993 & Supp. 1995).

band together and not leave land-use decisions exclusively to each town.

People ex rel. Town of Pelham v. Village of Pelham,⁵⁰ on which the author relies,⁵¹ was a 1915 decision overturning a state law authorizing each town in Westchester County to assess property within villages in those towns, and collect taxes on that property.⁵² The Court of Appeals ruled this law “strips the local village officials of every vestige of authority which they formerly possessed in this regard, except the right to fix and determine the amount of the annual tax.”⁵³ This was “an invasion of the local rights of the village . . . in direct violation of the home rule provision of the Constitution.”⁵⁴ Unlike the laws at issue here, the statute in *Pelham* had not the slightest justification as a matter of statewide concern. *Pelham* has been limited to its unusual facts by later cases. It has been held not to apply to a tax for a park district encompassing a village and other areas.⁵⁵

The Court of Appeals has consistently made it clear that in “enacting a zoning ordinance, consideration must be given to regional needs and requirements.”⁵⁶ In the recent *Long Island Pine Barrens Society, Inc. v. Planning Board of Town of Brookhaven*,⁵⁷ that court strongly urged regional planning to protect Long Island’s aquifer and water supply, as a matter of “urgent public concern,” and chided the Legislature for its failure to act.⁵⁸ The Legislature responded by adopting the Long Island Pine Barrens Protection Act, establishing a commission comprised of a State representative, the Suffolk County Executive and the supervisors of the three involved towns.⁵⁹ This regional body is empowered to draft a land-use plan governing the pine barrens region, essential to the aquifer, which straddles the

50. 215 N.Y. 374, 109 N.E. 513 (1915).

51. See Pirro, *supra* note 2, at 493.

52. See *Town of Pelham*, 215 N.Y. at 388-89, 109 N.E. at 517.

53. *Id.* at 388, 517.

54. *Id.*

55. See *Village of Kensington v. Town of North Hempstead*, 236 A.D. 340, 258 N.Y.S. 355 (2d Dep’t 1932), *aff’d*, 261 N.Y. 260, 185 N.E. 94 (1933).

56. *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 111, 341 N.E.2d 236, 242, 378 N.Y.S.2d 672, 681 (1975).

57. 80 N.Y.2d 500, 606 N.E.2d 1373, 591 N.Y.S.2d 982 (1992).

58. *Id.* at 517-18, 606 N.E.2d at 1381, 591 N.Y.S.2d at 990.

59. See N.Y. ENVTL. CONSERV. LAW § 57-0119(2) (McKinney Supp. 1997).

three towns.⁶⁰ The plan must be adopted by unanimous vote, and has recently been so adopted.⁶¹

Numerous similar examples of regional land-use planning fostered by State statute exist—the Adirondack Park Agency,⁶² the Tug Hill Commission with its consolidated planning board,⁶³ the Hudson River Valley Greenway,⁶⁴ New Jersey's Pinelands Protection Act,⁶⁵ and many others. Vermont has adopted statewide land-use controls for large-scale development,⁶⁶ as have Maine⁶⁷ and Hawaii.⁶⁸ The Tahoe Regional Planning Agency actually crosses state boundaries to control land use and development around Lake Tahoe, which straddles California and Nevada.⁶⁹ The need for comprehensive planning and land-use decision-making is so patent and well-documented⁷⁰ that there can be no serious issue as to its validity and no plausible claim that it interferes with home rule.

Delegation of Power

The author next argues that these statutes unconstitutionally delegate zoning authority.⁷¹ In fact these enactments contain guidelines—"to undertake comprehensive planning and land use regulation," to further "enhanced protection of commu-

60. See *id.* § 57-0121 (McKinney Supp. 1997).

61. See *id.* § 57-0121(12). See also *L.I. Pine Barrens Becomes 3d State Preserve*, N.Y. TIMES, June 29, 1995, at B5.

62. See N.Y. EXEC. LAW §§ 801-820 (McKinney 1996).

63. See Benjamin P. Coe, *Tug Hill, New York Progress Through Cooperation in a Rural Region*, NATIONAL CIVIC REV. 449 (Fall-Winter 1992). The Tug Hill Commission was created by the state legislature in 1972. Act of June 8, 1972, ch. 972, 1972 N.Y. LAWS 3872.

64. See N.Y. ENVTL. CONSERV. LAW §§ 44-0101 to 44-0121 (McKinney Supp. 1997).

65. See N.J. STAT. ANN. §§ 13:18A-1 to 13:18A-49 (West 1991).

66. See VT. STAT. ANN. tit. 10, §§ 6001-6008 (1993 & Supp. 1996).

67. See ME. REV. STAT. ANN. tit. 30-A, §§ 2321-2342 (West 1996).

68. See HAW. REV. STAT. §§ 205-1 to 205-37 (1993 & Supp. 1995).

69. See CALIF. GOV'T CODE §§ 66800-66801 (West 1983 & Supp. 1997); NEV. REV. STAT. §§ 277.190-277.220 (1995).

70. See, e.g., Patricia E. Salkin, *Regional Planning in New York State: A State Rich in National Models, Yet Weak in Overall Statewide Planning Coordination*, 13 PACE L. REV. 505, 509 (1993) (citing recommendations for regional and statewide land-use planning as long ago as the administration of Gov. Franklin D. Roosevelt). See also Nolon, *supra* note 8.

71. See Pirro, *supra* note 2, at 494.

nity resources,⁷²—similar to those in the statutes enabling municipalities to zone.⁷³ It has been many decades since the courts have set aside police-power enactments on the basis of improper delegation to an administrative agency. The modern view is that the Legislature may “direct that an administrative officer . . . have ample latitude within which . . . to ascertain the conditions which [the Legislature] has made prerequisite to the operation of its . . . command.”⁷⁴

The statutes authorizing intermunicipal agreements as to planning and land use plainly contemplate that consolidated planning boards “may replace individual planning boards.”⁷⁵ In other words, they may assume the powers local planning boards have, and no more. Consolidated boards enjoy the authority given municipal planning boards in other provisions of the law.⁷⁶ They do not somehow absorb the sort of unlimited powers the author fears.

Finally, Mr. Pirro suggests that the legislation he questions does not relate to health, safety or welfare.⁷⁷ But that, of course, is what zoning, planning and land-use controls are all about. Such statutes have been consistently sustained as valid exercises of the police power ever since *Village of Euclid v. Ambler Realty Co.* in 1926.⁷⁸ The venue for objections to the suitability or wisdom of joint planning boards is the Legislature, not the courts. Many years ago, in turning its back on archaic notions of due process such as those urged in this attack, the Supreme Court held:

72. N.Y. GEN. CITY LAW § 20-g(1) (McKinney Supp. 1997); N.Y. TOWN LAW § 284(l) (McKinney Supp. 1997); N.Y. VILLAGE LAW § 7-741(l) (McKinney 1996).

73. See N.Y. GEN. CITY LAW §§ 20(24), (25) (McKinney 1989); N.Y. TOWN LAW § 261 (McKinney 1987); N.Y. VILLAGE LAW § 7-700 (McKinney 1996).

74. *Yakus v. United States*, 321 U.S. 414, 425 (1944). See also *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 221-22 n.7 (1986) (“the delegation of discretionary authority was a reasonable means of achieving congressional aims”); *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 49 (1966).

75. N.Y. GEN. CITY LAW § 20-g(4)(a) (McKinney Supp. 1997); N.Y. TOWN LAW § 284(4)(a) (McKinney Supp. 1997); N.Y. VILLAGE LAW § 7-741(4)(a) (McKinney 1996).

76. See, e.g., N.Y. GEN. CITY LAW § 27 (McKinney Supp. 1997); N.Y. TOWN LAW § 271 (McKinney Supp. 1987); N.Y. VILLAGE LAW § 7-718 (McKinney 1996).

77. See Pirro, *supra* note 2, at 498-502.

78. 272 U.S. 365, 387 (1926).

Under the system of government created by our Constitution, it is up to the legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy.

The doctrine . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of the legislative bodies, who are elected to pass laws.⁷⁹

De Facto Taking

The author's final objection, that these laws amount to a de facto taking,⁸⁰ is premature at best. Such a taking occurs only when a land-use regulation deprives the owner of all reasonable investment-backed expectations.⁸¹ Mere reduction in the value of a parcel does not constitute a taking.⁸² The prospect that a law might, if improperly applied, deny a landowner all reasonable value does not entitle him or her to challenge it facially.⁸³

Therefore the claim that these statutes "may create a de facto building moratorium because municipalities are authorized to create another layer of planning review"⁸⁴ is speculative. As noted earlier, the statutes do no more than codify the right municipalities already had to plan cooperatively.⁸⁵ There is scant basis for assuming that joint planning would lead to the reflexive disapproval of development. And the disapproval of a particular proposal would be judicially reviewable whether done by a single town or a consolidated planning board.

79. *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963).

80. See *Pirro*, *supra* note 2, at 502.

81. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

82. See *Lucas*, 505 U.S. at 1015.

83. See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985); *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 294 (1981).

84. *Pirro*, *supra* note 2, at 504.

85. See *supra* note 7 and accompanying text.

Finally, most disapprovals of development plans are not de facto takings in any event. Even a disapproval that a court overturned as arbitrary and capricious would only amount to a taking of property were it to deny the owner of all reasonable investment-backed expectations—a rare occurrence, which the landowner must prove on the facts of the individual case.⁸⁶

Conclusion

The Legislature has simply recognized that land-use issues often transcend the borders of individual localities, and has codified the right that municipalities have historically had to cooperate in planning and controlling development should they see fit. The varied objections voiced against consolidated boards are unlikely to succeed. Legislation of this nature enjoys a powerful presumption of constitutionality, and the New York courts have consistently made clear the need for planning and land-use regulation at a regional level. Areas that protect their environment from sprawl and uncontrolled development are not just more attractive places to live and work; they tend to enjoy greater economic prosperity as well. Legislation that furthers these interrelated goals is welcome, and will likely be embraced, not overturned, by the courts.

86. See *supra* text accompanying notes 81-83.