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# Local Protection: Raising a Matter of 'Sovereign Concern'

John R. Nolon
*Elisabeth Haub School of Law at Pace University*

**Local Environmental Protection:**
**A Matter of Sovereign Concern**

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John R. Nolon

[Professor Nolon is Charles A. Frueauff Research Professor at Pace University School of Law, the Director of its Land Use Law Center and Joint Center for Land Use Studies, and Adjunct Professor at the Yale School of Forestry and Environmental Studies.]

**Abstract:** Challenges to the expansion of local initiatives aimed at local environmental protection question the powers delegated to municipal governments from the state. New York case precedent suggests that express and implied police power authority conferred from the state to municipalities is a broad concept and includes the power to protect natural resources, scenic views, and other environmental concerns. Through the use of this power, localities are better able to meet the environmental challenges they are faced with by using innovative grass-roots initiatives.

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Is the protection of the environment a "sovereign concern" of local governments in New York? In the past few years, the adoption of local environmental laws has proliferated indicating, *de facto*, that it is. But where do local governments get their authority to do so? Local legislatures have adopted provisions that protect steep slopes, trees, viewsheds, watersheds, river and stream banks, wetlands, and a host of other natural resources. In previous columns, these laws were described in some detail and the point made that they are now sufficient in number to constitute a body of law that could be called *local environmental law*. (See NY Law J., February 21, 2001, p 5 and June 20, 2001, p. 5.).

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. 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 – 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 define 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. Such laws will

also define who has responsibility for the proper functioning of natural resources. 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.

Such an important function, one would think, would be spelled out explicitly in the statutes that delegate the authority to legislate to local governments. It is understood that municipalities have no inherent powers, but can exercise only that authority expressly granted or necessarily implied from, or incident to, the powers expressly granted. If local governments are to play an important role in protecting the environment, it is essential that they have the authority to do so. In previous columns the authority of local governments to adopt such laws as part of their delegated zoning and planning authority and under their home rule authority was discussed. In this article we turn to a discussion of the authority that local governments may exercise under their delegated police power to protect environmental features and functions in their communities.

Villages in New York have been delegated police power under § 4-412 of the Village Law. This statute authorizes village boards of trustees to adopt laws that are "deemed expedient or desirable for … the safety, health, comfort, and general welfare of [their] inhabitants, [and] the protection of their property…." Cities, towns, and villages are delegated the power to adopt laws related to the "safety, health and well-being of persons or property therein." (Municipal Home Rule Law §10(1)(ii)(a)(12). These statutes delegate an uncertain range of police powers to local governments in New York. They mention nothing about the protection of the environment or the furtherance of any other specific interests of the community, so the question is whether environmental protection is among the interests that may be regulated by local law.

The Village of Atlantic Beach creates an interesting context in which to examine the extent of local police power because it was never granted the power to adopt zoning and land use laws. Under the charter of Nassau County (L.1936, c. 879; §§1606-7) the Town of Hempstead, within which Atlantic Beach is now located, retained against all future villages the exclusive right to regulate land use. When Atlantic Beach was created, it became one of very few municipalities in the state that can not adopt zoning and other land use regulations. *In Garnett v. Village of Atlantic Beach* the question arose whether a village that did not have the authority to adopt zoning laws could pass a law regulating the construction of outdoor residential swimming pools. (84 Misc.2d 460, 376 N.Y.S.2d 802, 1975) Since the contested village law regulated rear yard set back and lot coverage, it was held to be a zoning regulation, not a police power matter, and thus was beyond the scope of the village's authority. In dicta, the court revealed an interesting dimension of local land use authority by noting that "zoning…is primarily concerned with the orderly, comprehensive planning and development of communities and the use of land therein." Since the regulation of swimming pools concerned these matters, it was deemed to be outside the police powers of the village of Atlantic Beach. This suggests that environmental protection laws that regulate land use, as most of them do, are included in the statutes that delegate land use authority to localities in New

York. The *Garnett* case does not preclude the conclusion that they are included under the delegated police power as well, because it was the preemption of land use regulations by the county charter in Nassau that was the controlling factor in the case, not the scope of the village's police power. The limited holding of the *Garnett* case is that since swimming pool construction is a land use matter, that authority was retained by the town and not within the village's authority.

A year later, Atlantic Beach was back in court, this time defending a sign control ordinance that concededly could be adopted under a municipality's land use authority. The question was whether the village, without the benefit of such authority, could adopt a sign control ordinance under its delegated police power. In *Century Federal Savings and Loan Association v. Village of Atlantic Beach*, 86 Misc.2d 863, 383 N.Y.S.2d 524, the petitioner challenged the authority of the village to regulate its sign arguing that such power is a land use matter and outside the village's power. The court reviewed the history of the state legislative delegation of police power to villages and noted that the current provision of village law, § 4-412, replaced a series of specific delegations of power with a general grant of power to protect the health, safety, and welfare of citizens intending not "to limit the powers of a village, but to expand them." If further found that there is a "health, safety, and welfare dimension to regulation of signs near streets and public places." The court found that this sign control law was akin to village laws that regulate the burning of leaves, the emission of noxious odors, and the regulation of other nuisances such as noise. It noted that there is a regulatory area going beyond traditional land use control where the use of land results in dangerous traffic distractions, excessive illumination, obstruction of light and air, and countless conceivable other threats to the public. In this realm, the court said, "land use becomes a matter of *sovereign concern* quite apart from classic zoning conception." (emphasis added) It is not difficult to imagine this court holding that local laws preventing erosion, sedimentation of water bodies, the degradation of wetlands, or the clearing of ridgelines within the sovereign concern embodied in the police power delegated to local governments.

This conclusion conforms to the sentiment of a variety of other decided cases, none of them involving local environmental protection laws explicitly. For example, the precautionary principle on which so much of federal environmental law is based is found in local police power cases in New York. Cases hold that local ordinances must be reasonably related to some manifest evil but that the evil need only be reasonably apprehended. The fact that no public injury has actually occurred is not determinative of the validity of a police power regulation. This supports local efforts to prevent long-term but gradually occurring pollution of streams, rivers, lakes, and aquifers. Dicta in several other cases provide further support. It has been said that the police power is one of the most fundamental, and least limitable, of the powers delegated to local governments. Courts have stated that this power extends to all the great public needs. It has been called very broad, or at least broad enough to allow localities to protect their citizens.

Where environmental concerns motivate the adoption of local laws, courts have found the requisite benefit and protection of the public. In *Kranz v. Town of Amherst* (192 Misc. 912, 80 N.Y.S. 2d 812 (1948)) an ordinance regulating the removal of top soil was challenged as "an arbitrary abuse of power exceeding any requirements of health, morals, or public welfare of the Town." The ordinance was designed to address the ill effects of top soil removal which included the deterioration of the land, depressions and excavations as catch basins for waters which become breeding places for mosquitoes, flies and other insects; the virtual destruction of the fertility of the land; and the esthetic offense of denuded areas. These purposes reflect distinct environmental values, respecting environmental functionality itself, not just the prevention of short-term or immediate public health injuries.

The *Kranz* case was decided over 50 years ago. In upholding the town's ordinance the court expansively interpreted the locality's police power. It wrote, "The police power may be held to include any good faith and reasonably prudent legislative program indicated as essential to the growing needs of a modern concept of the true welfare of a forward looking community." This language suggests a positive answer to the question of whether local legislatures may use their police powers to adopt laws that protect steep slopes, trees, viewsheds, watersheds, river and stream banks, wetlands, and a host of other natural resources. These surely constitute actions essential to proper community development in the modern era. Together with land use provisions, such as conservation elements of master plans, restrictive zoning of critical environmental districts, and environmental standards in subdivision regulations, these laws would surely constitute a program appropriate to a contemporary "forward looking" community.

The holdings and dicta of numerous New York cases indicate that in this state there is a robust combination of power, based on land use and police power authority, that will sustain the inventions of local governments in the interest of environmental protection. It should not be surprising that critical and needed legal innovations of this type are emerging at the grass roots level – that protecting the environment has become a local sovereign concern. 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 "while 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 operations. In a changing world, it is impossible that it should be otherwise." *See Euclid v. Ambler Realty* 272 U.S. 365, 387 (1926).