

Pace University

DigitalCommons@Pace

Pace Law Faculty Publications

School of Law

8-15-2001

Battle for the Ages: Defining Federal Power to Affect Local Land Use

John R. Nolon

Elisabeth Haub School of Law at Pace University

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Land Use Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

John R. Nolon, Battle for the Ages: Defining Federal Power to Affect Local Land Use, N.Y. L.J., Aug. 15, 2001, at 5, <http://digitalcommons.pace.edu/lawfaculty/706/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

Federal Power to Affect Local Land Use: A Battle for the Ages

Written for Publication in the New York Law Journal
August 15th, 2001

John R. Nolon

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

Abstract: Under the 10th Amendment, the United States Constitution allows states to control land use within their jurisdiction. The federal government therefore, in its efforts to mitigate environmental damages caused by sprawl and over development, is limited to federal statutes carried about by federal agencies such as the Environmental Protection Agency managed Clean Water Act. Although these federal programs are helpful at reducing pollution from point sources, they are precluded from regulating non-point sources, such as the increased storm water run-off caused by expanding development. Through federally backed programs, states could support regional land use planning that would encourage stronger environmental standards. This article describes several approaches to intergovernmental environmental regulation.

In my last two columns, I reported on our discovery of a remarkable number of recently adopted local environmental protection laws and evaluated what this trend might mean. These local environmental laws take a number of forms. We have found environmental values expressed in local comprehensive plans, zoning districts created to protect watershed areas, environmental standards contained in subdivision and site plan regulations, and discrete, stand-alone environmental laws adopted to protect particular natural resources such as ridgelines, wetlands, floodplains, stream banks, existing vegetative cover, and watersheds. The clear purpose of these laws is to restrict the private use of the land in the interest of environmental protection. There is little doubt about the legal authority of local governments to adopt such laws and to restrict such uses under the zoning and planning enabling acts and provisions of the Municipal Home Rule Law.

While this trend has been evolving, federal agencies under federal environmental law have attempted to accomplish similar results through a more circuitous route. This is evident, particularly, in the efforts of the Environmental Protection Agency (EPA) to control air and water pollution. Early attempts by the EPA to limit concentrations of vehicles in order to reduce air pollution by imposing parking surcharges, reducing allowed parking spaces, and controlling the siting of major employment facilities were

recognized as a threat to the power of the states under the Tenth Amendment to control land use. They were met with amendments to the Clean Air Act in 1977 that expressly prohibited federal requirements aimed directly at land use control because of the political and legal vulnerability of such strategies. (See, CAA, § 131)

The 1977 Clean Air Act amendment was 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. It 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. 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 United States Supreme Court. In *Solid Waste Agency of Northern Cook County v. United States Corps of Engineers*, 2001 U.S. LEXIS 640 (2001), the Court held that the Army Corps lacked jurisdiction under the Clean Water Act to regulate developments in intrastate, non-navigable waters solely on the basis of the presence of migratory birds. 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 federal funds to states to encourage land use planning to prevent nonpoint source pollution. States and local governments are encouraged under the federal Coastal Zone Management Act to adopt plans to preserve coastal areas. Federal financial aid is denied for developments in sensitive coastal areas under the Coastal Barrier Resources Act. The modification of habitats that may harm endangered species is prohibited under the Endangered Species Act, unless the modification is allowed by a permit issued pursuant to an approved habitat conservation plan. Local governments and state agencies are involved in the preparation of such plans and, as far as they go, such plans affect private land use and constitute a limited type of land use planning.

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. Federal funding can be denied to any development projects that do not conform to State Implementation Plans. 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, not the regional, level. Federal transportation spending under the Transportation Equity Act for the 21st Century provides authority to regional transportation planning agencies to fund projects that

reduce traffic congestion and to acquire scenic easements and create bicycle trails. It also provides tax breaks for employers who subsidize employees' use of mass transit.

These are but a few of many similar federal actions that are aimed at stemming air and water pollution, but which 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 struggle on the part of the federal government to reach down to the local level and influence directly what happens on the land to prevent the degradation of air quality and water resources.

A current 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. On July 16, 2001, the EPA filed its proposal in the U.S. Court of Appeals for the District of Columbia to delay by 18 months the effective date of its final rule under the Total Maximum Daily Load (TMDL) Program established under § 303(d) of the Clean Water Act. The TMDL program requires states to identify and list waters not meeting federally-established water quality standards. States are required to allocate the quantity of particular pollutants among the sources that discharge into its impaired waters and to insure that pollutants do not exceed federal standards.

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 run-off 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, its ability to regulate the thousands of sources of 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. The EPA's authority under the TMDL program, for example, has been challenged under *American Farm Bureau Federation v. Whitman*, D. C. Cir., No. 00-1320 and consolidated cases, 7/18/00.

It is interesting to ask what EPA could do, 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 impaired waters. Hypothetically, the 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 other available penalties for state noncompliance that are within EPA's control, 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.

In New York, it is clear that the state has the authority to preempt local land use authority to address a matter of state concern. Preventing potentially hazardous water quality degradation surely constitutes such a concern. Neither this need nor the state's authority to act, however, will necessarily overcome the historic reluctance in New York and many other 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. Despite the litany of these ills, which include exclusionary zoning, the adverse environmental impacts of sprawl, and frustration of regional planning, only a few states have preempted local land use prerogatives or seriously directed local decision-making. It is doubtful that they will do so to implement the federally-designed TMDL program.

Perhaps the recent advent of local environmental law 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 have given 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 generally on a watershed basis, such as creating zoning districts or overlay zones the borders of which follow the topographical boundaries of critical watersheds. There are even examples of local planning that integrates watershed and transportation corridor planning. 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 importance of being able to influence land uses at the local level to achieving federal environmental goals is clear. Nonpoint source pollution is the cause of nearly half of the remaining water quality problems in the United States and is intimately related to land use. 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, the Chairman of the Council on Environmental Quality, Russel Train, testified that land use is "the single most important element affecting the quality of our environment which remains substantially unaddressed as a matter of national policy." (Diamond, Land Use: Environmental Orphan, *Envtl. Forum*, Jan./Feb. 1993, at 31, 32.) 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 10th amendment is a persistent one.

Since the defeat of the National Land Use Planning Act, federal energies have been directed toward the creation of technology-based 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 of the EPA to implement the TMDL program. Because of the cost and complexity of achieving its objectives, the TMDL drama will continue to play for a number of years. While it does, there may be an opportunity to strengthen the capacity of local governments to play a central and productive role in achieving important federal environmental objectives.

The federal government can encourage more states to delegate authority to protect natural resources to local government by funding the preparation and promulgation of a model enabling act. It was a similar act created by the Department of Commerce in 1924 that led to the rather rapid adoption of state zoning enabling acts and of local zoning ordinances. Providing 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. More federal funding can be provided for the identification of critical watersheds 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 level is that local authority in land use control must become a fixture of federal environmental policy. This premise is often challenged because its corollary is thought to be the surrender of national efforts to create and enforce effective standards. This corollary is frightening to those who believe that voluntary approaches to compliance with environmental standards is doomed to fail. Federal efforts to encourage a healthy trend toward local protection of natural resources and other smart growth initiatives could be seen, instead, as a strategic effort to build the capacity of the permanent partners of the federal government in environmental protection. This capacity-building approach can also be seen as a complementary effort to enforce federally-established 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, and combat the ill-effects of sprawl.