2-21-2001

Our Town: What Is the Role of Local Government in Environmental Law?

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Written for Publication in the New York Law Journal
February 21, 2001

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Abstract: The scope of environmental law extends beyond the federal statutes most people associate with protecting the natural world. At both the state and local level, governments have broad authority to protect the environmental integrity within their jurisdiction. State legislation such as New York's State Environmental Quality Review Act (SEQRA) affect all government actions that may have a negative environmental impact. Furthermore, local governments, using tools originally created to enhance the value and safety of property are now using this authority, and other more novel methods, to mitigate negative environmental impacts. This article gives a brief synopsis on the background of local environmental law, and then discusses where municipal governments derive environmental lawmaking power.

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Introduction

This column has run now for over three years. It may be time to try to define its theme: local environmental law. To my knowledge, there is no casebook, textbook, or law school class on the subject. Environmental law courses typically concentrate on the critical content of federal statutes. Environmental law students spend most of their time in class learning the details of preventing point source pollution, cleaning up hazardous and toxic waste sites, regulating the taking of threatened and endangered species, or governing the extraction of non-renewable resources, among other matters of national concern. The role of local governments is mentioned, usually very briefly, in environmental law classes and casebooks, and 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, or even the Endangered Species Act. Conceptually, the role of local governments is seen as that of 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.

In New York, environmental lawyers intersect with land use law regularly because of the breadth of the State Environmental Quality Review Act (SEQRA). SEQRA designates local land use agencies "lead agencies" when they have primary responsibility for approving a developer's proposed project. It requires them to declare whether development projects might have an adverse impact on the environment. When

they might, the local agency is required to prepare an environmental impact statement. SEQRA requires that the lead agency certify that the "action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable…." The types of effects that are to be considered and mitigated under SEQRA include potential adverse impacts on land, water, air, plants and animals, agricultural resources, aesthetic resources, historic and archeological resources, growth and character of community or neighborhood, and open space and recreation. This state imposed review authority has given substantive authority to local governments to protect the environment in their review of development projects by authorizing lead agencies to seek alternatives, or impose mitigation conditions, that are more protective of the environment than the developer's proposal. Despite the breadth and substance of the environmental review authority given to local review boards by SEQRA, there is still much more to local environmental law than this.

Background

The local role in these matters is usually studied in courses called Land Use Law and practitioners in that field are thought of as distinct from environmental lawyers. It is widely known that local governments have been given a key, if not the principal, role in land use regulation. Zoning is the foundational device in this field. Local governments may adopt zoning ordinances and maps, and provide thereby for the future development of their communities. Comprehensive zoning began as a civil engineering and fire prevention concept. It focussed on the layout of streets and highways; the location of public buildings; the ability of fire trucks and firemen to reach and fight fires; and the predictability of land use in designated zoning districts to protect property values and develop a workable community. Subdivision and site plan regulations emerged to complement these aspects of local land use controls. Such regulations concentrated on the creation of safe intersections; the fluid movement of vehicles; the adequacy of road width, curbs, and sidewalks; and the prevention of off site impacts such as soil erosion or flooding. In their inception, these regulatory tools were not designed to protect natural resources from degradation.

Beginning in the 1950's some communities saw large lot zoning as a crude way of protecting open space and its associated natural resources. Up-zoning in suburban areas, however, was aimed principally at controlling population growth, maintaining residential property values, and containing the cost to the community of servicing development while, incidentally, limiting water use, preventing aquifer contamination, and containing non-point source pollution.

This 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. In New York, local laws on the following subjects can now be found and studied: Cluster Subdivision, Environmentally Sensitive Area Protection, Erosion and Sedimentation Control, Filling and Grading, Floodplains Control, Ground Water/Aquifer Resource Protection, Landscaping, Mining and Excavation, Ridgeline Protection, Scenic

Resource Protection, Soil Removal, Solid Waste Disposal, Steam and Watercourse Protection, Steep Slopes, Stormwater Management, Timber Harvesting, Tree Protection, Vegetation Removal, and Wetlands.

In addition to the advent of these special purpose regulations, there is evidence that environmental standards are being found in subdivision, site plan, and special permit regulations and in the zoning ordinance itself. This has caused observers to wonder about the distinction between the power to zone and regulate land use in the traditional sense and to adopt laws to protect the environment.

Municipal Authority

State law delegating the authority to local governments to regulate land uses is quite broad. The Town Law, Village Law, and General City Law all empower localities to regulate land uses "with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout [the] municipality." *See* N.Y. Village Law § 7-704; N.Y. Town Law § 263; N.Y. General City Law § 20. For municipal attorneys who do not read this as a broad enough delegation of authority to empower localities to adopt regulations to protect discrete environmental assets, there is additional power. The Municipal Home Rule Law authorizes municipalities to adopt local laws to protect the "physical environment" in general and to protect several enumerated aspects of the environment. *See* N.Y. Municipal Home Rule Law, Article 2, § 10(1)(ii)(a). Under this authority, localities may act with respect to their property, affairs, and government. This statute also authorizes localities to protect the safety, health, and well-being of persons or property. State enabling acts in New York are, in fact, full of authority to protect the environment.

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. Local comprehensive plans may identify and provide for the preservation of historic and cultural resources, natural resources and sensitive environmental areas. *See* N.Y. Village Law § 7-722(4)(d); N.Y. Town Law § 272-a (3)(d); N.Y. General City Law § 28-a (4)(d). Since all land use regulations are required to conform to the comprehensive plan, such provisions help sustain environmental regulations when they are challenged. *See* N.Y. Village Law § 7-704; N.Y. Town Law § 263; N.Y. General City Law § 20 (25).

Zoning: It is legitimate for zoning provisions to achieve environmental objectives. Long ago, judicial approval of two acre zoning was based on court's understanding of the public interest in the "present character, appearance and environment of this rural high-class residential community." *Elbert v. North Hills*, 262 A.D. 856, 28 N.Y.S.2d 172 (2d Dept. 1941), *rehearing denied*, 262 A.D. 872, 29 N.Y.S.2d 152 (2d Dept. 1941). Zoning codes may 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 if a factual basis for this action is created. Under this authority, solid waste facilities, manufactures of hazardous

substances, certain mining operations, and other high-intensity uses have been prohibited. More recently, zoning districts have been created that use the boundaries of watersheds for their limits rather than their traditional reliance on major roads as dividing lines between districts. The Town of Clinton, in Dutchess County, for example, has a conservation zone that is coterminous with the watershed area that drains into two critical lakes in the community.

Overlay Zoning: Overlay zoning is a flexible zoning technique that allows a municipality to discourage development in certain environmentally sensitive areas. An overlay zone is defined as "a mapped overlay district superimposed on one or more established zoning districts." 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. A parcel within the overlay zone will thus be simultaneously subject to two sets of zoning regulations: the underlying and the overlay zoning requirements. One purpose of an overlay zone is to conserve natural resources without unduly disturbing the expectations created by the existing zoning ordinance. In areas that contain particularly valuable natural resources, zoning might not suffice and more specific provisions may be needed to preserve the natural environment. Unique natural or aesthetic resource areas, such as a pine barren, wetland resource area, watershed, or tidal basin, can be identified and protected. The Town of Washington created an environmental floating zone that automatically alights on a parcel proposed for development when that parcel contains two or more of five designated natural features that the town wishes to protect from the impacts of development.

Site Plan and Subdivision Approvals: Site plan and subdivision regulations adopted by the local legislature may require that environmental impacts be revealed in maps, plats and drawings submitted for review. These regulations may also authorize the reviewing body to condition any approval on design and layout changes that are reasonably related to the prevention of environmental damage or to the preservation of natural resources nearby. This authority regarding applications for site plan approvals is found in Village Law Section 7-725-a(2)(a), Town Law Section 274-a(2)(a), and General City Law Section 27-a(2)(a). These statutes allow localities to require that all 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] . . .” The authority regarding subdivision approvals is found in Village Law Sections 7-728 and 7-730; Town Law Sections 276 through 278; and General City Law Sections 32 through 34 and 37. These provisions allow local governments to provide for the future development of the municipality by authorizing their planning boards to review and approve subdivision plats that show the lot layout, dimensions and topography of the subdivision.

Clustering: Provisions of the Town Law, Village Law, and the General City Law, allow local legislatures to authorize their planning boards to waive zoning standards such as minimum lot sizes, height requirements, and set backs to “preserve the natural

and scenic qualities of open lands." N.Y. Village Law § 7-738; N.Y. Town Law § 278; N.Y. General City Law § 37. 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" and 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." The Town of Stanford requires residential structures to be clustered to protect agricultural soils and to preserve farming and its rural way of life.

Tree Ordinances: General Municipal Law, Section 96-b, authorizes local governments to adopt tree preservation laws based on aesthetic as well as other grounds. A tree preservation ordinance allows a community to restrict the removal of trees on private property in order to preserve their environmental and aesthetic importance. Tree ordinances typically limit their applicability to trees of a certain diameter and height. They 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. A municipal tree preservation ordinance was found to be a proper exercise of local authority to protect health and general welfare. *See Seaboard Contracting & Material, Inc. v. Smithtown*, 147 A.D.2d 4, 541 N.Y.S.2d 216 (2d Dept. 1989).

Incentive Zoning: Under state statutes, local legislatures may allow developers to build at greater densities than allowed under zoning in exchange for public benefits such as the preservation of open space. The Town of LaGrange, for example, awards a 40% density bonus when a developer promises to preserve 80% of a site for farming purposes. The state statutes also allow communities to receive cash payments in exchange for the zoning incentives awarded a developer. This allows localities to use the cash to achieve the public benefit directly. Using this authority, it is possible for the community to purchase development rights, or conservation easements, on valuable open space land using the cash contributed by a developer who is granted zoning incentives to build in an appropriate location that can absorb the development impacts. *See* N.Y. Town Law § 261-b; N.Y. Village Law § 7-703; N.Y. General City Law § 81-d*.*

Transfer of Development Rights: New York statutes define transfer of development rights 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." *See* N.Y. Town Law § 261-a; N.Y. Village Law § 7-701; N.Y. General City Law § 20-f. A comprehensive plan in the Long Island Pine Barrens allocates development credits to land in the fragile pine barrens aquifer, based on their development yield under local zoning, and greatly restricts development in these "sending districts." 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 land owners in sending districts. Each purchased credit allows the developer to build one housing unit over that permitted by the receiving district's zoning.

Conclusion

In *Berman v. Parker,* 348 U.S. 26 (1954), the Supreme Court held that the public welfare that is to be advanced by land use regulations is broad and inclusive. “The values it represents,” wrote Mr. Justice Douglas, “are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.” The New York legislature has responded by authorizing local governments to protect their environmental assets through numerous provisions of the Village Law, Town Law, General City Law, Municipal Home Rule Law, General Municipal Law, and Environmental Conservation Law. This ample authority has been judiciously framed by the case law which cautions localities to base their environmental regulations on careful planning, definitive studies, inventories or expert reports, and other clear evidence of rationality.