

Pace Environmental Law Review

Volume 23
Issue 3 *Special Edition 2006*
*The Intersection of Environmental and Land
Use Law*

Article 5

September 2006

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Recommended Citation

A. Dan Tarlock, *Three Challenges for Professor Nolon*, 23 Pace Env'tl. L. Rev. 697 (2006)
Available at: <https://digitalcommons.pace.edu/pelr/vol23/iss3/5>

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Three Challenges for Professor Nolon

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John Nolon is a brave academic. In a dark time in the United States generally, and for environmental protection and natural resources management specifically,¹ he has dared to dream an alternative vision of the status quo. Not only has he dared to dream an alternative, he has worked to implement it on the ground, in the Hudson River Valley and elsewhere, and to generalize the experience to express optimism about the wider significance of these efforts. His recent effort to do this, *Champions of Change: Reinventing Democracy Through Land Law Reform*,² envisions a built landscape which is better adapted to mitigating the damages from a wide range of natural disasters, is more sustainable, and strikes a better balance between protection of sensitive lands and productive ecosystems than the current pattern of ever-expanding urban boundaries. He has set a formidable challenge for himself.

We are well into the fourth decade of environmental regulation, but compared to the progress that we have made in air and water pollution, we continue to use and abuse land in an unsustainable manner. No comparable regulatory regime has developed. Some fragmented federal and state regulation has emerged, but this regulation is, on the whole, weakening rather than strengthening, as well as calcifying.³ Consequently, the burden of

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1. An assessment of the Bush II Administration's environmental record by the leading conservative environmental law thinker, Professor Barton Thompson of Stanford University, concludes that where the Administration has pursued environmental objectives, the reforms principally "reduce the regulated community's costs of achieving various environmental goals or devolve responsibility to states in contexts where the regulated community might be more amendable to state regulation." Barton H. Thompson, Jr., *Conservative Environmental Thought: The Bush Administration and Environmental Policy*, 32 *ECOLOGY L.Q.* 307, 347 (2005).

2. *Champions of Change* was originally published in the Harvard Environmental Law Review. See 30 *HARV. ENVTL. L. REV.* 1 (2006). The article is reprinted here at page 905 with the permission of the editors of the Harvard Environmental Law Review.

3. Oregon's is the model of a progressive land use regulatory scheme, but in 2004 Oregon voters adopted Ballot Measure 37. The measure gives land owners a variety of remedies against land use regulations that lessen the fair market value of their prop-

regulating land falls on local governments. Historically, this has been seen as an unfortunate byproduct of our federal system because local governments often lack the will to do more than to set minimal rules for the accommodation of land development and lack the legal competence to address environmental problems at the appropriate geographic scale.

While acutely aware of these problems, Professor Nolon dissents from this pessimistic view and finds that “[v]iewed as an organic whole, these local laws and practices demonstrate remarkable adaptation to contemporary needs and challenges.”⁴ The “these” refers to the adoption of hundreds of local land use laws designed to protect natural resources and to abate nonpoint source pollution, the increasing incident of mediated large-scale development plans, and increased technical assistance for local governments in many areas. Efforts like these are further complemented in many areas with the efforts of NGOs to put new issues, such as the relationship between water supply and urban development, on the planning and political agenda. Together, these responses can be used by local governments to creatively and democratically adapt to a complex, fragmented, and increasingly environmentally conscious land use ethic. One can also develop a new regulatory paradigm from these efforts. Scholars such as Jody Freeman argue that in the post-modern (post New Deal) state, the best hope for addressing problems lies with modular regulation.⁵ Modular regulation is essentially the substitution of compliance with uniform mandates with ad hoc processes that address a specific problem.⁶

It is too early to pass judgment on the significance of the efforts, and other similar ones, that Professor Nolon has spearheaded. In this commentary, I temper my skepticism by casting it in the form of some challenges for Professor Nolon and others working in today’s political and legal environment. I iden-

erty. See *MacPherson v. Dep’t of Admin. Servs.*, 340 Or. 117, 121 (2006). The Oregon Supreme Court upheld the constitutionality of the measure against the argument that the measure denied Oregon citizens the benefits of rational legislative regulation. *Id.* at 126-28, 141.

4. John R. Nolon, *Champions of Change: Reinventing Democracy Through Land Law Reform*, 30 HARV. ENVTL. L. REV. 1, 9 (2006).

5. See Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795 (2005). Professors Freeman and Farber use the example of the Bay-Delta Process, an ambitious effort to balance water consumption with the preservation of the San Francisco Bay Delta. *Id.* at 836-76.

6. See *Id.* at 798.

tify three primary, nonexclusive ones: the moral hazard problem, the function of zoning, and the problem of “third best.” I look forward to learning how Professor Nolon and his team successfully address them.

I. THE MORAL HAZARD PROBLEM

The effort to create a built landscape that is better adapted to mitigate the damages caused by natural disasters must confront the fundamental problem that United States land use law creates too many incentives to assume bad, predictable risks and very few incentives to avoid the consequences of the risk. Efforts to design more environmentally sustainable landscapes seek to do no less than to impose the economic doctrine of moral hazard on public and private land use decisions. The legal and political challenges to reverse the incentives to construct a landscape that can adapt to natural disasters, especially those that may be enhanced by global climate change, are formidable.

The root of the problem is the economic concept of moral hazard. Economists and students of natural disasters such as Gilbert White have long argued that it is economically irrational to encourage people to locate in the face of danger, such as in flood plains or vulnerable hurricane zones, and then acquiesce to their demands to be compensated when damage occurs. However, both law and a long history of charity toward the victims of fate have created the expectation that the inefficient assumption of risk will be rewarded, not penalized. Economists call this the moral hazard problem. Of course, there are important differences among types of location choices and disasters. However, with few exceptions, all levels of government encourage and reward landowners for moral hazards.

The incentive to assume risks starts with the Fifth Amendment and continues through the well-justified expectation that the federal government will compensate the victims of a wide range of natural disasters. In between is the long history of the construction of flood control projects and a federal flood insurance program that still encourages building in high risk areas. The problem is not with the basic idea of helping victims of natural disasters, but in our inability to distinguish between deserving victims and subsidized risk takers. In a recent article, *Can We Save New Orleans?*,⁷ Professor Oliver Houck envisions a future for

7. Oliver Houck, *Can We Save New Orleans?*, 19 TUL. ENVTL. L.J. 1 (2006).

southern Louisiana built to prevent the retardation of natural water flow and to reduce the human population in high risk areas. However, as he observes, "it will be nearly insane in a region that equates planning with socialism and has always looked on the Corps for a bigger fix."⁸

The political process is, of course, endlessly open to blunt efforts to create incentives to minimize the damages caused by extreme natural events in advance of their occurrence.⁹ However, the idea that land owners have no responsibility to avoid moral hazards is built into the constitutional conception of property recognized in *Lucas v. South Carolina Coastal Council*¹⁰ and subsequent cases. In *Lucas*, the Supreme Court held that a complete elimination of the value of property for development can be a categorical taking. The Court recognized that there are a limited number of common background exceptions to title,¹¹ such as the duty not to use one's property to cause a nuisance, but it refused to accept the state's rationale that the regulation prevented the destruction of other property during hurricanes. Most of the critical environmental commentary concerning *Lucas* has focused on the Supreme Court's hostility to the idea of environmental regulation unaccompanied by full compensation. However, the plurality's rejection of the state's damage prevention argument illustrates that the modern idea of property remains rooted in the notion of exclusive dominion subject only to the duty not to cause a nuisance. This view also lies behind the Court's dismissal of the argument that the purchaser of highly regulated property assumes the risk of development denial. The Court quipped, "[t]he State may not put so potent a Hobbesian stick into the Lockean bundle."¹² Locke himself might be surprised that his labor theory has now incorpo-

8. *Id.* at 61.

9. See e.g., Vicki Been, *Lucas v. The Green Machine: Using the Takings Clause to Promote More Efficient Regulation?*, in PROPERTY STORIES 221 (Gerald Korngold & Andrew P. Morriss eds., 2004) (detailing how efforts to protect South Carolina's fragile beaches were rolled back after *Lucas* contrary to the theory that takings law promotes the adoption of efficient regulatory programs).

10. 505 U.S. 1003 (1992).

11. See Michael C. Blumm & Lucus Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles As Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321 (2005) (surveying the post-*Lucas* cases and finding that the background limitation defense is growing; many examples of the defense involve resources, such as water, fishing quotas, and public land mining, where the expectation of exclusive dominion has always been lower than it has for land).

12. *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001).

rated the Roman law right of *ius abutendi*, the right to destroy property.

II. THE LIMITED FUNCTION AND POWER OF ZONING

Land use law is increasingly called upon to perform a broad range of functions for which it was not originally designed. Land use controls, especially zoning, are a product of the Progressive Era. Zoning was born in the major metropolitan areas and reflected the untested idea that a well-planned built environment would make people's lives better.¹³ Specifically, zoning was built on two ideas, both of which are ultimately grounded in the common law of nuisance: the protection of the single family neighborhood from inferior uses (and people), and the protection of superior real estate from inferior parasitic uses. Much urban and suburban zoning still revolves around these issues, although the underlying progressive rationale has long since vanished. In fact, the whole idea of the need for rigid use segregation has long been discredited.

As Professor Nolon has long pointed out, zoning has considerable capacity to evolve, and courts have long held that the common law of nuisance is not the limit of the police power. However, the fact remains that zoning was never developed as a tool to regulate non-urban landscapes on a comprehensive scale. Zoning and subdivision controls have evolved considerably, but cities still are limited to tinkering with the pace and density of individual developments and to "taxing" them within the limits of *Nollan-Dolan* legal exactions.

The decades-long argument that regulation should be subordinated to planning has borne some fruit, and there are many large-scale planned communities being built in growing areas; most regulatory decisions, however, are still relatively small-scale, individual adjustments. The result can be analogized to fitting the pieces of a jigsaw puzzle together with no expectation that a clear picture will ever emerge. Put differently, zoning is still heavily influenced by the common law of nuisance. Regulation can prevent the undesirable side-effects of certain uses much bet-

13. JOHN D. FAIRFIELD, *THE MYSTERIES OF THE GREAT CITY: THE POLITICS OF URBAN DESIGN, 1877-1937* (1993) (demonstrating that zoning represented the partial triumph of the progressive ideal that expert government intervention is necessary to temper the operation of the market and that rational, scientifically based planning and intervention can improve people's lives).

ter than it can create a sustainably built urban environment or conserve a rural one. For example, the current landscape, which is the product of a long chain of federal, state, and local policies, has been much criticized. But, continued sprawl is strongly defended both as the best way to promote low- and moderate-income housing and as a rational post-9/11 strategy to mitigate the damages from potential terrorist attacks.¹⁴

III. THE PROBLEM OF “THIRD BEST”

In recent years, there has been a great deal of interest in addressing land use and resource management problems through ad hoc, stakeholder, place-driven processes. These processes have been promoted as alternatives to the rigidities of the strict enforcement of command and control regulatory programs, inevitably followed by “rule of law” litigation.¹⁵ Professors Jody Freeman and Daniel Farber have defined these as processes that mix horizontal government coordination with vertical stakeholder participation as modular regulation. “[M]odularity requires that institutional form follow function wherever possible, meaning that the goal of the modular enterprise is first to diagnose problems and second to devise solutions and match institutions capable of implementing them.”¹⁶ However, the benefits of the substitution of ad hoc negotiations for more formal planning and regulatory processes remain an unproven theory.

The search for more flexible ways to address land use conflicts is a worthy goal, although there are many constraints and serious accountability problems. For example, entrenched entitlement holders often have little incentive to change the status quo, serious power imbalances may be perpetrated by the process,¹⁷ and the processes are costly and time consuming. The biggest risk is

14. Edward H. Ziegler, *American Cities and Sustainable Development in the Age of Global Terrorism: Some Thoughts on Fortress America and the Potential for Defensive Dispersal II*, 30 WM. & MARY ENVTL. L. & POL'Y REV. 95, 140 (2006).

15. Much of the first generation of environmental law, and to some extent modern land use law, has been developed through litigation that seeks the strict enforcement of statutory or constitutional mandates. See A. Dan Tarlock, *The Future of Environmental “Rule of Law” Litigation*, 19 PACE ENVTL. L. REV. 575 (2002).

16. Freeman & Farber, *supra* note 4 at 876.

17. See Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions Installment One*, 24 STAN. ENVTL. L.J. 3, 36 (2005); Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions Installment Two*, 24 STAN. ENVTL. L.J. 269, 291-93, 315-16 (2005).

that these processes will suffer a variant of the economist's "second best" problem:¹⁸ The new solution may be worse than what would result from the application of conventional regulation.

Efforts to implement innovative land use solutions at the local level pose two interrelated substantial risks: sub-optimum scale and the lack of a vision of a sustainable landscape. First, there is a mismatch between political boundaries and local jurisdiction. The result is often either inequitable spillovers or the failure to achieve the desired objectives. For example, well-planned community growth management programs simply push growth outward into less regulated rural areas. In general, we have failed to create institutions to coordinate local land use decisions with serious inter-regional impacts. Likewise, piecemeal environmental programs like wetlands conservation and restoration are almost never done at the necessary watershed level.¹⁹ Second, the processes are a journey toward an undefined objective in the hope that the process will yield a legitimate and widely accepted objective. But the United States has only two visions of the landscapes, both of which are increasingly problematic.

We have either landscapes fenced off from development under public land laws, such as the wilderness system, or through public and private acquisition of open space; or we have tolerated and encouraged endless low-density development. Landscapes have traditionally been seen as canvases to be improved upon by human intervention. In contrast, European planning proceeds from a much more static, integrated view of the built landscape. It has proceeded from a vision of a compact and dense city surrounded by a tranquil and well-ordered countryside. As Professor Guido Martinotti has written, "most European urban thought just assumes that the countryside is there with the character of the medieval paintings . . . [w]ell-ordered fields like one can see in a Brueghel painting . . . stay . . . in the back of our consciousness as some kind of reassuring landmark."²⁰ The net result is that all land uses have been seen as transitional stages in an endless pro-

18. Second best theory posits that when all the conditions for an optimum or efficient solution are not met, attempts to solve may result in an even less optimum or efficient solution. I use the term here as a metaphor for the risks that new means of conflict resolution to fill the vacuum left by the collapse or calcification of previous regulatory regimes may pose.

19. NATIONAL RESEARCH COUNCIL, COMPENSATING FOR WETLAND LOSSES UNDER THE CLEAN WATER ACT 54 (2001).

20. GUIDO MARTINOTTI, PERCEIVING, CONCEIVING, ACHIEVING: THE SUSTAINABLE CITY: A SYNTHESIS REPORT 41 (1997).

cess of dynamic change.²¹ Thus, it is difficult to set a target against which innovation and processes should be measured.

21. My colleague Fred Bosselman has characterized Illinois land use law as the product of nineteenth-century attitudes which "caused its residents to view land itself simply as another form of capital that could be made 'abstract, standardized and fungible' through an 'alchemy' of commodification." Fred P. Bosselman, *The Commodification of "Nature's Metropolis": The Historical Context of Illinois' Unique Zoning Standards*, 12 N. ILL. U. L. REV. 527, 531 (1992).