

January 2003

Introduction: Considering the Trend toward Local Environmental Law

John R. Nolon

Pace University School of Law, jnolon@law.pace.edu

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

Recommended Citation

John R. Nolon, *Introduction: Considering the Trend toward Local Environmental Law*, 20 Pace Envtl. L. Rev. 3 (2003)

Available at: <https://digitalcommons.pace.edu/pelr/vol20/iss1/2>

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 Environmental Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

Introduction: Considering the Trend Toward Local Environmental Law

JOHN R. NOLON*

As western forests burn, homes are destroyed and lives are lost. Local governments, through their zoning laws, permit housing construction in fire prone canyons and brush lands. These same laws place homes, pavement, people, pets, and automobiles in countless tricky places: the Mississippi's flood plain, on California's steep slopes, in Rocky Mountain viewsheds, over Connecticut's aquifers, among Georgia's rich wildlife habitats, and in suburban locations that are more and more distant from centers where residents work, shop, and recreate.

Federal environmental laws prevent and clean up air, soil, and water pollution. They have reduced point source pollution, emanating from water pipes and smoke stacks, and cleaned up hazardous waste sites. We think of environmental lawyers as practicing *federal* environmental law; knowledge of complex federal and state pollution prevention and clean up statutes is their stock in trade. Yet most traditional federal and state environmental laws are not aimed at many of the causes of today's environmental degradation. Nonpoint source pollution – run off from roads, driveways, parking lots, and roofs associated with land development – is the cause of nearly half of the nation's water quality problems. Sprawl causes habitat destruction, air pollution from the exhaust pipes of cars stuck in traffic, the disappearance of open space, and the decline in quality of community life. The law responsible for these environmental problems is *local* land use law: zoning and associated private land regulations adopted by city, town, and village legislatures.

Opinion polls identify the environmental problems that come with nonpoint source pollution and sprawl as the primary concerns of community residents today. In direct response, a new

* Professor of Law and Director of the Land Use Law Center, Pace University School of Law; Visiting Professor, Yale School of Forestry and Environmental Studies. The author thanks Kristen Kelley for her invaluable research assistance.

field of environmental law has evolved. In recent years, local governments have adopted laws protecting habitats, requiring developers to obtain natural resource management permits, and enforcing standards to protect large critical environmental areas in the interests of biodiversity. Other local laws regulate land development based on how many vehicle trips are generated, require new buildings to reduce energy consumption by 30%, mandate brownfield cleanup, prevent use of abandoned mines for depositing construction and demolition debris, and encourage denser, mixed use development to reduce automobile trips. The interests advanced by these local laws are the historical domain of federal environmental law: prevention of water and air pollution, hazardous waste cleanup, and the protection of endangered and threatened species. These local laws also, and uniquely, are aimed at preventing nonpoint source pollution and the ill effects of sprawl - objectives that have so far eluded federal lawmakers and regulatory agencies.

In this symposium issue of the Pace Environmental Law Review we take a close look at the advent of local environmental law. With the editors of the Review and a number of distinguished scholars and practitioners, we define what this new field is and consider what it means for public policy and the practice of law. The intent of this issue is to invite lawyers, scholars, practitioners, legislators, regulators, students, and citizen leaders to consider this burgeoning new field: *local environmental law*. It is my task to introduce the reader to the field and frame the issues for its further development.

In 1782 Blackstone wrote this remarkable description of English property rights:

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims over the external things of the world, in total exclusion of the right of any other individual in the universe.¹

Blackstone noted, enigmatically, that this absolute right was to be enjoyed “without any control or diminution, *save only by the laws of the land*.”² Since the Statute of Winchester of 1285, laws limit-

1. WILLIAM BLACKSTONE, PROPERTY IN GENERAL I-16 (1887).

2. *Id.* at 138 (emphasis added).

ing despotic dominion over the land have been adopted and accepted as necessary.³

In 1922 before zoning was found to be constitutional, Mr. Justice Holmes declared that “if [a land use] regulation goes too far it will be recognized as a taking,” in violation of the Fifth Amendment property rights guarantees.⁴ In that same year, as I imagine it happening, the chief executive officer of Ambler Realty Company woke up on a Thursday morning to learn that a local law had been adopted the night before by the village council in Euclid, Ohio that divided the company’s 68 acres of industrial land into three land use categories. This novel law allowed residential development on one portion of the land, mixed use on another, and industrial use on a third. The officer’s call that morning to the company attorney resulted in litigation challenging zoning, on its face, as unconstitutional. After years of litigation, the U.S. Supreme Court’s 1926 opinion held such use-restricting local laws constitutional unless they “are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”⁵

This was a remarkable triumph for “the laws of the land” and a severe blow to “despotic dominion.” We have been arguing since about whether particular land use laws substantially advance these important public values. In this book, we examine the trend toward adopting local laws that protect natural resources and environmental functions, inquiring whether, and to what extent, private land is held subject to environmental interests. We also trace the evolution of local environmental law, examine how local governments obtain authority to adopt such laws, and ask how it squares with our understanding of federal and state environmental law and local land use law.

Under state zoning and planning enabling acts, local governments have been given a key, if not the principal, role in land use regulation.⁶ Zoning is the foundational device in this field. Local

3. 13 Edw. 1, Stat. 2 (1285).

4. Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

5. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

6. “Land use regulation in the United States traditionally has been the province of local governments using zoning ordinances and building codes as their principal regulatory tools.” ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 768 (3d ed. 2000). See also ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 1164 (2d ed. 1994). “In day-to-day practice, the overwhelming majority of land-use management occurs at the local level, predominately through local government regulation. . . .” *Id.*

governments may adopt zoning ordinances and maps, and thereby provide for the future development of their communities. Comprehensive zoning began as a mechanism for protecting public health and safety by separating incompatible land uses from one another. In its application, zoning became design-oriented, focusing on the layout of streets and highways, the location of public buildings, the ability of firefighters to reach and fight fires, size and bulk requirements that protect property values, and infrastructure connections that create workable communities.⁷

Subdivision and site plan regulations emerged to complement zoning and help localities implement their physical plans. Such regulations initially concentrated on the creation of safe intersections; the fluid movement of vehicles; the adequacy of road width, curbs, and sidewalks; the siting of buildings; and the prevention of off-site impacts such as flooding. In *Golden v. Ramapo*, the leading state court case sustaining local growth management ordinances, New York's highest court referred to subdivision control as a mechanism "to guide community development in the directions outlined here, while at the same time encouraging the provision of adequate facilities for the housing, distribution, comfort and convenience of local residents."⁸ In their inception, regulatory tools, such as subdivision and site plan regulations, were not designed to protect natural resources from degradation.⁹

7. After citing expert reports to sustain the constitutionality of zoning, the U.S. Supreme Court's decision in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926), stated:

These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to raise children, etc.

Id. Despite the court's focus on these limited purposes of early zoning, several of its strongest advocates thought that zoning should and could be used to achieve purer environmental objectives. See Earl Finbar Murphy, *Euclid and The Environment, in ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 168-74* (Charles M. Haar & Jerold S. Kayden eds., 1989).

8. *Golden v. Ramapo*, 30 N.Y.2d 359, 372 (1972).

9. "[L]and use law, zoning, and subdivision controls typically are not concerned with environmental degradation; their purposes are to regulate the timing and sequence of development to minimize costs to the community and to avoid conflicting uses." THOMAS J. SCHOENBAUM & RONALD H. ROSENBERG, *ENVIRONMENTAL POLICY LAW* 379 (3d ed. 1991).

Communities have long used large lot zoning as a crude way of protecting open space and its associated natural resources.¹⁰ Upzoning occurred in some suburban areas, aimed principally at lowering development densities to control population growth, maintain residential property values, and contain the cost of servicing development while, incidentally, limiting water use, preventing aquifer contamination, and containing nonpoint source pollution.¹¹ As the national environmental movement evolved and matured in the 1970s and 1980s, the sensitivity of local lawmakers was raised and early signs of the adoption of local environmental law became apparent. These emerged from a variety of influences focused mostly on protecting the lives and property of local citizens. The National Flood Insurance Program, for example, required local governments to adopt and enforce floodplain management programs as a prerequisite to local eligibility for national flood disaster assistance payments.¹² Catastrophes influenced the movement, leading to stormwater management regulations and stringent setback requirements along the coasts of barrier islands that are particularly vulnerable to hurricane damage.¹³ The 1990s saw the advent of local laws clearly designed to protect environmental functions and these, in the aggregate, now constitute a significant body of law.

The 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 laws with the following titles can now be found and studied:

10. See *Senior v. Zoning Comm. of New Canaan*, 146 Conn. 531, 153 A.2d 415 (1959); see also *Philip Simon v. Town of Needham*, 311 Mass. 560, 42 N.E.2d 516 (1942).

11. In 1976, the Model Land Development Code adopted by the American Law Institute recognized the capacity of local planning and zoning to protect critical environmental areas and natural resources at the local level. A MODEL LAND DEV. CODE 128-29 (1975). See *id.* § 2-209: "A development ordinance may designate special preservation districts of historical, archaeological, scientific, architectural, natural, or scenic significance. . . ." *Id.* 128-29. See also *id.* § 3-103: "A Local Land Development Plan shall be based on all the following studies. . . (f) geological, ecological, and other physical factors that would be affected by development." *Id.* 128-29. The Code was prepared as a new model for state legislatures to adopt to update the Standard Planning and Zoning Enabling Acts of the 1920's. It was not entirely adopted anywhere. Article 7 of The Model Code contained provisions allowing states to veto local zoning decisions concerning large-scale developments, developments of regional benefit, and areas of particular concern.

12. 42 U.S.C. §§ 4011, 4013 (1989 & Supp. 2001); 44 C.F.R. pt. 61 (2000).

13. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

cluster subdivision,¹⁴ environmentally sensitive area protection,¹⁵ erosion and sedimentation control,¹⁶ standards for grading, filling, and excavations,¹⁷ floodplains control,¹⁸ ground water/aquifer resource protection,¹⁹ landscaping,²⁰ ridgeline protection,²¹ scenic resource protection,²² soil removal,²³ solid waste disposal,²⁴ stream and watercourse protection,²⁵ steep slopes,²⁶ stormwater management,²⁷ timber harvesting,²⁸ tree protection,²⁹ vegetation removal,³⁰ and wetlands.³¹ Interestingly, many of these ordinances deal with the prevention of nonpoint source pollution, an urgent problem that generally is conceded to be beyond the reach of federal environmental law.

We found these laws and many similar ordinances over the last three years and began to develop a framework for understanding them as a discrete field of law. We assembled samples from this collection, organized them according to this framework, and published them as a guidebook for local governments organized as if it were a comprehensive set of local environmental laws.³² The guidebook contains language from local comprehensive plans and zoning ordinances that reflect environmental values and protect environmental resources, such as watersheds. The guidebook includes subdivision and site plan regulations that contain explicit and extensive environmental standards and a cluster development ordinance that requires clustering of develop-

14. See John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365 n.165-71 and accompanying text (2002).

15. TOWN OF PAWLING, N.Y. ZONING CODE, ENVIRONMENTALLY SENSITIVE AREAS § 215-24.

16. Nolon, *supra* note 14, at n.178-79 and accompanying text.

17. BOROUGH OF BALDWIN, PA., BALDWIN BOROUGH GRADING ORDINANCE § 99.

18. Nolon, *supra* note 14, at n.185-89 and accompanying text.

19. *Id.* at n.171-73 and accompanying text.

20. CITY OF NEW BERLIN, WIS. SUBDIVISION OF LAND, LANDSCAPING § 235-32.

21. Nolon, *supra* note 14, at n.190-95 and accompanying text.

22. *Id.* at n.196 and accompanying text.

23. *Id.* at n.178-79 and accompanying text.

24. VILLAGE OF AKRON, N.Y. SOLID WASTE ch. 131, art. II.

25. Nolon, *supra* note 14, at n.217-25 and accompanying text.

26. *Id.* at n.197, 199 and accompanying text.

27. *Id.* at n.200, 202 and accompanying text.

28. *Id.* at n.203-04 and accompanying text.

29. *Id.* at n.210-16 and accompanying text.

30. CITY OF NEW BERLIN, WIS. ZONING, NATURAL RESOURCE PROTECTION § 275-54 (3).

31. Nolon, *supra* note 14, at n.217-25 and accompanying text.

32. PRESERVING NATURAL RESOURCES THROUGH LOCAL ENVIRONMENTAL LAWS: A GUIDEBOOK FOR LOCAL GOVERNMENTS (Land Use Law Center ed., 2001).

ment in order to protect critical environmental resources. When we found a community that drew the boundaries of a zoning district along the topographical lines of a watershed, we knew we were witnessing something new.

It was not, however, until we found local laws from Tumwater, Washington, Apple Valley, Minnesota, and Sun Prairie, Wisconsin, that the fundamental novelty of the trend toward local environmental law struck us. The Tumwater ordinance protects fish and wildlife habitat. It declares that the preservation of these local resources "is critical to the protection of suitable environments for animal species and in providing a natural beauty and healthy quality of life for Tumwater and its citizens."³³ Chapter 152 of the Code of Apple Valley governs "natural resource management."³⁴ It requires all new development involving "land disturbing activity" to obtain a natural resources management permit. The findings section of this local law says "the City Council finds it is in the best interest of the city to protect, preserve and enhance the natural resources and environment of the community and to encourage a resourceful and prudent approach to the development and alteration of the land."³⁵ Chapter 17.28 of the Sun Prairie, Wisconsin Code is novel in its comprehensive approach to natural resource protection. This one code chapter contains provisions that protect floodplains, wetlands, shore lands, drainage ways, woodlands, steep slopes, ridgetops, prairies, and other permanently protected green space.³⁶ Its central strategy is to direct site development to those areas that do not contain sensitive natural resources.³⁷

One of the logical questions the emergence of this kind of novel environmental law raises is whether such laws have been challenged in court and how the courts have reacted to those challenges. The drama that occurred in Euclid, Ohio on that day in 1922 when the village adopted its first zoning law was repeated in the 1970s in Dade County, Florida. The owners of industrially zoned land challenged the county when it rezoned - from heavy industrial uses to large lot single family housing - over 300 acres

33. TUMWATER, WASH. FISH & WILDLIFE HABITAT PROTECTION ORDINANCE 1283, § 1 (1991).

34. CITY OF APPLE VALLEY, MINN. tit. XV LAND USAGE, NATURAL RESOURCE MANAGEMENT ch. 152.15(A) (1997).

35. *Id.* § 152.01(A).

36. CITY OF SUN PRAIRIE, WIS. ZONING, NATURAL RESOURCE PROTECTION REGULATIONS ch. 17.28 (2001).

37. *Id.* at ch. 17.20.010.

of the Biscayne Aquifer, a major source of the county's drinking water.³⁸ The property owner contended that the rezoning bore no reasonable relationship to the public health, safety, morals and welfare. The court found that the county's home rule charter gave it powers to enact zoning laws to assure an adequate water supply for the protection of the public. Specifically, the court said, "[w]e hold that preservation of the ecological balance of a particular area is a valid exercise of the police power as it relates to the general welfare."³⁹

A similar challenge was brought in 2001 against the zoning commission of New Milford, Connecticut when it amended its zoning to exclude all wetlands, watercourses, and steep slopes from the calculation used to determine the minimum lot area required for development.⁴⁰ Again, landowners claimed that such a provision lacked a rational basis to legitimate local police power objectives. Pointing to language in the State of Connecticut's zoning enabling statute that permits municipalities "to encourage the most appropriate use of the land" through zoning provisions,⁴¹ the court determined that the amendment had a "reasonable relationship to the legitimate goal of balancing development and conservation."⁴²

Another inquiry we pursued is whether, and to what extent, state law provides authority to local governments to adopt environmental laws. The language cited above in the Connecticut zoning enabling act appeared in the Standard Zoning Enabling Act promulgated by the U.S. Department of Commerce in the 1920s and found its way into the statutes delegating zoning authority to local governments in most states.⁴³ We examined the law in a number of states and found that they use a variety of techniques to delegate legal authority to protect the environment to their municipalities. New York, for example, provides very broad authority to its municipalities to adopt environmental laws. Under the Municipal Home Rule Law, localities are given the authority to adopt laws relating to their "property, affairs or government,"⁴⁴ to "the protection and enhancement of [their] physical and visual en-

38. *Moviematic Indus. Corp. v. Dade County*, 349 So. 2d 667. (Fla. Dist. Ct. App. 1977).

39. *Id.* at 669.

40. *Harris v. Zoning Comm'n*, 788 A.2d 1239 (2001).

41. CONN. GEN. STAT. ch. 124, § 8-2 (2001).

42. *Harris*, 788 A.2d at 1256.

43. See N.Y. TOWN LAW § 263 (McKinney 2002).

44. N.Y. MUN. HOME RULE LAW § 10(1)(i) (McKinney 1994).

vironment,”⁴⁵ and to the matters delegated to them under the statute of local governments.⁴⁶ The statute of local governments delegates to municipalities the power “to adopt, amend and repeal zoning regulations” and to “perform comprehensive or other planning work relating to its jurisdiction.”⁴⁷

In Georgia, the state legislature is more selective and directive in delegating such authority. Comprehensive planning authority delegated to local governments in Georgia is tied to the state’s interest in protecting and preserving natural resources, the environment, and the vital areas of the state.⁴⁸ Certain elements must appear in local comprehensive plans, including plans for protecting natural and historic resources.⁴⁹ Under the rules of the Office of Coordinated Planning in Georgia, local land use planning is to strike a balance between the protection and preservation of vulnerable natural and historic resources and respect for individual property rights.⁵⁰ Under separate state legislation, local governments in Georgia are required to identify existing river corridors and to adopt river corridor protection plans as part of their planning process.⁵¹ They have the further authority to regulate shoreland developments.⁵² Finally, Georgia municipalities may regulate land-disturbing activity in order to control soil erosion and sedimentation.⁵³

Part of our research involved an analysis of law school casebooks in both environmental law and land use law to determine whether either legal academic field had incorporated “local environmental law.” We found that the role of local governments in land use control in general is only briefly mentioned in most environmental law casebooks.⁵⁴ When localities are referred to it,

45. *Id.* § 10(1)(ii)(a)(11).

46. *Id.* § 10(1).

47. *Id.* §§ 10(6) & 10(7).

48. GA. CODE ANN. § 36-70-1 (2000).

49. GA. COMP. R. & REGS. r. 110-12-1-.04(5) (2000).

50. *Id.* r. 110-12-1-.04(5)(f)(1).

51. GA. CODE ANN. § 12-2-8(2) (2000).

52. *Id.* § 12-5-241.

53. *Id.* § 12-7-4.

54. Several environmental law casebooks contain sections that recognize in a limited sense the nexus between local land use control and environmental protection. See, ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY ch. 7 (3d ed. 2000) (including a chapter entitled “Land Use Regulation and Regulatory Takings,” which generally outlines the role of state and local land use regulation, recognizes their relationship to environmental protection, and explores how regulatory taking challenges limit the exercise of state and local land use authority); THOMAS J. SCHOENBAUM & RONALD H. ROSENBERG, ENVIRONMENTAL POLICY LAW

it is usually 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, and the Endangered Species Act.⁵⁵ Conceptually, the role of local governments is seen as that of an incidental 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. A few land use casebooks cover local laws aimed at environmental protection, but their coverage is focused largely on one or more of the following topics: floodplain regulation, stormwater management, wetlands ordinances, agricultural zoning, or large lot zoning.⁵⁶ Even these topics are covered, most

ch. 6 (3d ed. 1991) (including a chapter discussing local planning, zoning, and subdivision regulations, focusing on the short-comings of local governmental decision-making and the trend toward the reclamation of land use regulatory authority by the states); ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY ch. 25 (2d ed. 1998) (observing, in a chapter entitled "Land Use-Based Environmental Control Statutes," that Americans fail to see a link between land-use regulation and environmental protection).

55. Several environmental law casebooks mention the role of local governments in environmental law in this oblique sense. *See, e.g.*, ELIZABETH GLASS-GELTMAN, MODERN ENVIRONMENTAL LAW: POLICY AND PRACTICE 486 (1997) (discussing the federal Superfund Program and the financial burden it can place on local governments); ENVIRONMENTAL LAW: FROM RESOURCES TO RECOVERY 326 (Celia Campbell-Mohn ed., 1993) (including a brief discussion of environmental law at the local level that is limited to agricultural zoning, conservation easements, and the transfer of development rights); FRANK P. GRAD ET AL., ENVIRONMENTAL LAW (4th ed. 2000) (including a chapter on land use planning that discusses agricultural zoning, growth management, and the transfer of development rights); FRED BOSSELMAN ET AL., ENERGY, ECONOMICS AND THE ENVIRONMENT 14 (2000) (explaining how energy companies must comply with local regulations and how local governments adopt laws to manage land development); JOHN E. BONINE & THOMAS O. MCGARITY, THE LAW OF ENVIRONMENTAL PROTECTION (1992) (outlining state and local control of hazardous waste facilities); JOSEPH SAX ET AL., LEGAL CONTROL OF WATER RESOURCES ch. 7 (1991) (limited to discussions on water supply and organizations at the local level); PETER MENNELL & RICHARD STEWART, ENVIRONMENTAL LAW AND POLICY 133-35 (1994) (discussing locally unwanted land uses in minority neighborhoods and local control of municipal waste treatment plants); ROGER FINDLEY & DANIEL FARBER, ENVIRONMENTAL LAW 513 (4th ed. 1995) (limited to hazardous waste facilities); WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW (2d ed. 1994); WILLIAM TABB, ENVIRONMENTAL LAW ch. 12 (2d ed. 1997) (containing a section on environmental regulation of land use that discusses the evolution of state and local land use, as well as agricultural zoning and the transfer of development rights).

56. CHARLES M. HAAR & MICHAEL ALLAN WOLF, LAND-USE PLANNING: A CASEBOOK ON THE USE, MISUSE, AND RE-USE OF URBAN LAND 702-04 (4th ed. 1989) (including a zoning ordinance from Fayette Co., Kentucky on floodplain conservation and protection, as well as a discussion on the reclamation of land use decision-making authority by the state governments from the local level); CURTIS J. BERGER, LAND OWNERSHIP AND USE 863-65 (3d ed. 1983) (discussing environmental issues at the local level, specifically in Sanbornton, New Hampshire, where minimum lot size re-

often, as functions that are incidental to zoning, subdivision, and site plan control. Again, there is more to local environmental law, as it is being practiced, than is discussed in these texts.

This apparent lack of attention to the emergence of local environmental law led the Land Use Law Center, with the co-sponsorship of the Environmental Law Institute and the Pace Environmental Law Review, to organize a symposium of distinguished professors and practitioners asking each participant to write a paper or provide commentary on this curious new field of property regulation. Not surprisingly, as we read drafts of submitted papers, we learned more. We found that home rule law is being used by communities as authority to conduct environmental impact reviews of locally approved development projects. We found evidence of local governments adopting laws that require the cleanup of brownfields, force the demolition of abandoned industrial properties, and prohibit the location of construction and demolition debris operations near sole source aquifers.

We organized the participants in the symposium into five panels for the presentation of the ten papers contained in this issue. Seventeen participants then discussed the papers to reflect on the meaning of this legal trend and to identify new issues that need to be explored. The senior editors of the Pace Environmental Law Review prepared proceedings of the presentations and discussions so that a record of the insights, recommendations, and

quirements were adopted); DANIEL R. MANDELKER, *LAND USE LAW* § 1.06 (4th ed. 1997) (describing zoning ordinances that accomplish agricultural land preservation and floodplain protection); DANIEL R. MANDELKER & JOHN M. PAYNE, *PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS* 351 (5th ed. 2001) (identifying the relationship between environmental law and land use controls in areas such as wetlands and floodplains and explains the difficulty that local governments can experience in regulating these resources); DANIEL P. SELMI & JAMES A. KUSHNER, *LAND USE REGULATION: CASES AND MATERIALS* 113 (1999) (explaining that local governments have ignored environmental impacts in subdivision regulation and illustrates how environmental protection requirements can be accomplished using local zoning and subdivision controls); DAVID L. CALLIES ET AL., *CASES AND MATERIALS ON LAND USE* 613-14 (3d ed. 1999) (outlining various local zoning techniques that can be used to protect agricultural land and discussing moratoria on new development to protect the environment and public health, explaining that such moratoria are based on the general police power of localities, not their zoning enabling authority); ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 904-10 (2d ed. 2000) (discussing environmental justice and difficulties in siting locally unwanted land uses); ROBERT R. WRIGHT & MORTON GITELMAN, *CASES AND MATERIALS ON LAND USE* 534, 548, 551 (5th ed. 1997) (discussing three cases dealing with environmental and land use issues at the local level: *In re Spring Valley Development*, 300 A.2d 736 (Me. 1973), *Sellon v. City of Manitou Springs*, 745 P.2d 229 (Colo. 1987), and *Corrigan v. City of Scottsdale*, 149 Ariz. 538 (1986)).

observations of the participants could be recorded. At the symposium and in the drafts of their final papers participants were asked to address five basic questions about local environmental laws. Those questions and the few corollary inquiries discussed by the participants are as follows:

1. How should authority over land use control and environmental protection be allocated among the levels of government? Professor Been discussed the implications of investor protection provisions in international free trade agreements regarding that allocation. Professor Malone discussed whether the reluctant performance of the states under the EPA's Total Maximum Daily Load Program should influence how much authority states and their localities should be allocated. Professor Weinberg reviewed existing models for shared responsibility among federal, state, and local agencies in land use control and environmental protection.
2. What options are available to allocate governmental responsibility for land use control and environmental protection? Professor Salkin described the recommendations of the Growing Smart Program of the APA for state legislative action in this field. Professor Tarlock's paper was discussed by Attorney Turner who reflected on whether there are negative consequences to leaving local governments out of the decision-making process regarding regional environmental assets and how regional assets, such as watersheds, can be protected by a legal system that relies so heavily on local control. Professor Cannon explained how local environmental laws can further state and federal environmental goals and how federal and state governments can provide incentives to further the adoption of local environmental law in turn.
3. Do localities have the capacity to exercise their delegated authority to protect environmental matters? Attorney Stever illustrated how a local government can use its delegated authority to prevent the abandonment of industrial properties and encourage brownfield redevelopment. Attorney Daly discussed how a local government prevented the proliferation of construction and demolition operations and the type of leadership, citizen involvement, and administrative capacity that is necessary to carry out such strategies. Professor Mandelker and Ms. Kathryn Plunkett explained how local land use agencies can conduct environmental impact reviews and how this can be done without greatly complicating local land use processes.

4. Should local land use regulations be broadened to include protection of environmental resources? Professor Wolf reflected on whether there is a danger of inviting greater judicial intervention and losing the presumption of validity that local land use laws enjoy by integrating environmental protection strategies in local land use control. Professor Callies considered how local and state governments are coping with the issues raised 30 years ago by the Quiet Revolution in Land Use Control. He noted that local governments play a critical role in local land use regulation that cannot be replaced by state or regional agencies and discussed the limits of state law preemption of local land use authority.
5. What does the trend toward greater environmental regulation at the local level mean? Where do we go from here? In the final panel, after listening to the papers and the discussions, Professor Cannon summarized what this trend toward local environmental law means and Attorney McElfish led a discussion among the participants to identify issues that call for further research and exploration.

The discussion at the symposium provided several key insights.

- Local environmental law has one clear effect in our democratic society. It invites local residents to get involved at a meaningful level of government with one of the clearest challenges of our times.
- Local environmental laws will define the linkages between what is built and what is natural. By codifying environmental expectations in local law, today's citizens will establish and pass along their understanding of local environments through the development patterns and the preserved landscapes that their laws create.
- Where connections across municipal lines are needed to protect regional environmental assets, citizens will discover those linkages and call for them to be created.
- Where national drinking water standards are not being enforced because of gaps in federal authority or competence, local citizens whose health is at risk will lobby locally for laws that reduce nonpoint source pollution.
- People who live locally tend to treat local landowners fairly since those owners, too, are citizens or taxpayers. Local citizens, understanding the importance of local control, may lobby for a balanced approach to land development and, through fair applications of their authority, retain the deference of the courts that local land use laws currently enjoy.

- Federal and state lawmakers and agency personnel have neither the time, resources, or information to micromanage the development of individual parcels, establish plans and visions for individual neighbors and communities, or to monitor water, soil, and other conditions in all places over time.
- Local citizens and their lawmakers and land use agencies have the most immediate stake in these matters and must be given a meaningful role in protecting their quality of life.
- State and local governments have plenary authority to protect the environment; they suffer little of the ambiguity that hamstring federal action. Localities, with state authorization, are able to fill in significant gaps in federal law by, for example, regulating nonpoint source pollution, protecting scenic and aesthetic values, and promoting biodiversity beyond retaining habitats for threatened or endangered species.

The authors of the papers in this symposium publication identify several obstacles to local involvement in this realm of regulation. First, local laws that limit foreign investors' rights may be sanctioned by investor protection provisions of international trade agreements. Second, state and local environmental interests may not be aligned with critical national interests that can be protected only by interstate standards and enforcement provisions. Third, regional needs may not be addressed by local governments whose legal authority ends at their parochial borders. Fourth, local governments may not have the financial and administrative resources needed to develop science-based objectives and to hold themselves and private landowners accountable for significant improvement in environmental conditions. Fifth, state laws do not evenly distribute environmental protection authority to local governments; state policy may emphasize control at the regional or state level and may not always correspond with either federal goals or local interests in environmental matters. These are significant obstacles that must be addressed if local environmental law making is to achieve meaningful success.

Our authors offer responses to a number of these limitations. They point out that the current, top-down approach suffers its own shortcomings, not the least of which is the perceived absence of federal jurisdiction to control local land uses. Even state governments experience political inhibitions that frustrate their preemption of local authority, either directly or through regional agencies. Further, federal or state enforcement of environmental

standards at the local level where conditions are highly diverse is prohibitively costly and of doubtful efficacy. The papers presented below offer a number of hopeful and practical suggestions for creating a more competent, integrated system that builds on the strength of each level of government. These include lowering the transaction costs of local environmental initiatives by providing local governments much needed geographical data, including inventories of local environmental resources, providing model ordinances for local governments to consider, and offering technical assistance to adopt and enforce them. They also include providing incentive grants to localities that adopt local laws that further national and state environmental goals, for example, to purchase the development rights of critical environmental lands or to cover the costs of establishing intermunicipal partnerships formed to protect watersheds, biodiversity, or coastal regions.

I learned many important lessons from these papers and the dynamic discussion that took place at the symposium. Perhaps the central message is the need for integrating levels of government in managing growth and conserving environmental assets. It is obvious that each level of government has a major contribution to make in insuring the proper use and conservation of the land, in creating the *laws of the land* that limit the enjoyment of private property. It is equally obvious that no level of government has all the competence, authority, and resources needed to solve modern environmental problems on its own.

Our legal system has evolved piecemeal. Separate and uncoordinated regimes at the federal, state, and local level have been created. The tensions among them abound and beg for mediation. The inefficiencies apparent in the current patchwork quilt of regulatory influences are being observed where people live, at the local level, and are being responded to by the adoption of an impressive body of local law. This trend toward local environmental law can be seen as evidence of further fragmentation of an increasingly dysfunctional system or as a clarion call to create a framework for federal, state, and local cooperation for managing the use of the land and protecting the environment in the 21st century.

My hope is that this symposium issue will create a sense of optimism and urgency about establishing this important framework. This task may be the central challenge we face in creating a competent "next generation" of environmental and land use law. A recent study by the Yale Center for Environmental Law and Policy decried the systematic disconnect between federal and state

environmental laws and land use regulations which are predominately local in nature. Yale's study concluded that local land use law could no longer be the "forgotten agenda" of our national environmental policy.⁵⁷ Local environmental law provides an important and practical link between the two fields.

I am grateful to the editors of the Pace Environmental Law Review for their tireless work and boundless energy in preparing this symposium issue and to the distinguished practitioners and professors who devoted so much of their time to considering this important, novel, and rapidly evolving field of law.

57. The results of this two-year effort were published in *THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY* (Marian R. Chertow & Daniel C. Esty eds., 1997).