

Pace University

DigitalCommons@Pace

Pace Law Faculty Publications

School of Law

12-1993

Land Use Law Reform: A Judicial And Practical Imperative

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](#)

Recommended Citation

John R. Nolon, Land Use Law Reform: A Judicial and Practical Imperative, N.Y. St. B.J., Dec. 1993, at 18, <http://digitalcommons.pace.edu/lawfaculty/608/>.

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.



Land Use Law Reform: A Judicial and Practical Imperative

BY JOHN R. NOLON

The practical lesson learned from a review of New York case law on land use planning is straightforward: judges will seldom overturn land use regulations when it is obvious, in the structure of the regulatory program, that considerable and comprehensive planning is involved.¹ When judges sustain land use regulations, they routinely find in the regulatory scheme a valid local planning objective that saves the regulation from falling under a property owner's attack. The bases for this judicial reasoning are the statutory requirement that zoning provisions must be adopted "in accordance with" a "comprehensive plan" and the constitutional requirement that land use regulations substantially advance a legitimate public purpose.

In these cases, the courts have impressed on local officials that they should take planning seriously as they consider and adopt land use regulations. The cumulative effect of the case law provides a powerful incentive for local governments to adopt land use plans, to keep them current and to see that local land use regulations accomplish their objectives. However, this lesson is better taught by the state legislature. Until the land use statutes are amended to incorporate this judicial comprehensive planning imperative, New York's municipalities are at risk of being unaware of its importance and, as a result, having their land use regulations invalidated.

There is an even more crucial lesson that the case law teaches; one that must be learned before the land use system is capable of handling the challenges of the 21st century. It is that "comprehensive"

planning, in modern society, means planning that considers and is responsive to "regional" land use needs. When regulations have only local effects, it is sufficient, for planning purposes, if they conform with a land use plan that is "comprehensive" in that it considers and accommodates the local impacts of land development. However, the impacts of local zoning and planning are often intermunicipal or regional in nature.

In 1972, the New York Court of Appeals, in *Golden v. Ramapo*, called on the state legislature to adopt a system of "[s]tate-wide or regional control of [land use] planning" to "insure that interests broader than that of the municipality underlie various land use policies."² The Court of Appeals reinforced this view again in 1975 when it wrote, "[a]lthough we are aware of the traditional view that zoning acts only upon property lying within the zoning board's territorial limits, it must be recognized that zoning often has a substantial impact beyond the boundaries of the municipality."³

The cases sustain these judicial observations. For example, in *Town of Bedford v. Village of Mount Kisco*,⁴ two neighboring municipalities battled over a rezoning near their borders. Bedford argued, with the county's agreement, that Mount Kisco's rezoning of an eight acre parcel in an isolated area of the Village, bounded on three sides by the Town of Bedford, was arbitrary and capricious. The court, in deciding the controversy, applied New York statutory law: zoning must be in conformance with the comprehensive plan of the municipality enacting the ordinance. The rezoning was found to be consistent with the Village's plan, and thus, the impact on the Town

was irrelevant. This case demonstrates the external impacts of one municipality's land use actions on another; it also illustrates how frustrating it is for impacted communities, like Bedford in this instance, to lack any influence over their neighbors' decisions.

In *Long Island Pine Barrens v. Planning Board*,⁵ three adjacent towns learned that failing to coordinate their land use actions can be costly in the extreme. In this case, the Court of Appeals reversed a lower court decision that had delayed and jeopardized over 220 development projects, valued at over \$11 billion and containing more than 12,000 housing units. The Appellate Division had held that the three towns where these projects were located must review the cumulative effect of the projects on the drinking water aquifer under the State Environmental Quality Review Act. The Court of Appeals disagreed, noting simply, "[h]ere... there is no plan." It found that a general governmental policy, contained in a host of local, state and federal laws, designed to protect the drinking water aquifer was not the same thing as a land use plan. Such a plan is the predicate for requiring an analysis of the cumulative effects of otherwise unrelated projects. The Court echoed its earlier sentiments, stating that "the existing system of land use planning in the region is plainly not equal to the massive undertaking that effective long-range planning would require, and some other system devised by a larger planning entity must be substituted." The state's highest court referred this matter of "urgent public concern" to the state legislature, just as it had twenty years ago.

It is clear, today, that local land use decisions regularly have regional impacts. However, this was not the case when the land use system was created in the early years of the twentieth century, when communities were separated

FOOTNOTES

¹ Copies of an analysis on New York's case law on land use planning are available by writing to the Land Use Law Center, Pace University School of Law, 78 North Broadway, White Plains, NY 10603 or calling (914) 422-4262.

² 334 N.Y.S. 2d 138, 150 (1972).

³ *Berenson v. New Castle*, 378 N.Y.S. 2d 672, 681 (1975).

⁴ 351 N.Y.S. 2d 129 (1973).

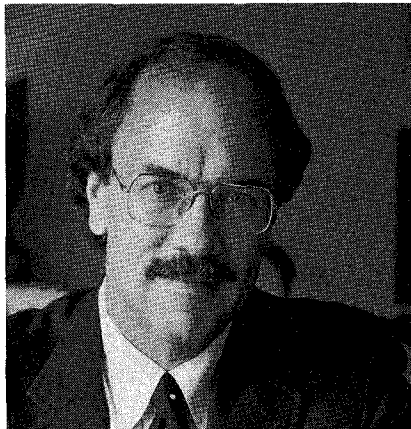
⁵ 591 N.Y.S. 2d 982 (1992).

geographically. Eighty years of sprawling development, hastened by the automobile and expansive highway system, have brought local jurisdictions and their residents into such close proximity that their actions greatly affect one another. The daily activities of most people are interjurisdictional as well: they live in one locality, work in another and shop and recreate in still others. Although the courts recognize these intermunicipal connections and encourage local zoning to accommodate regional needs, there is no statutory requirement that local comprehensive plans consider regional interests. The New York legislature has not provided for a statewide system of regional plans to which local plans could conform if their local drafters wished them to do so.⁶

Without some form of comprehensive planning at the regional level, the intermunicipal impacts of local land use decisions cannot be anticipated, measured and mitigated. These impacts have given birth to a dizzying array of federal and state statutes, the cumulative effect of which further erode local control over the land.⁷ Without regional planning, there is little opportunity to coordinate these federal, state and local regulations and programs. This defect in the historic land use system frustrates the goals of a large number of interest groups, including local officials who desire to control their municipal destinies. Also among those directly disadvantaged by the lack of regional planning are transportation and capital facility planners, business and development interests, those in need of affordable housing, farmers, preservationists and environmentalists. The stake of each of these groups in regional planning merits explanation.

Infrastructure Development

It is recognized that efficient transportation systems cannot be created without "comprehensive regional and local land use planning."⁸ In New York, state transportation planners have suggested that this difficulty be remedied by the adoption of a comprehensive regional land use planning system.⁹ For these planners, the principal benefit of regional comprehensive planning is that it affords a workable basis for providing transportation facilities while land development occurs and when the demand for those



John R. Nolon is a Professor of Law at Pace University School of Law in White Plains, NY, where he directs the Land Use Law Center and teaches and writes in the areas of land use, property, environmental regulation and real estate transactions and finance. He has recently published four law review articles on the land use regulatory system, home rule and regulatory takings and is editing a symposium issue of the Pace Law Review on Land Use Law Reform in New York. J.D. University of Michigan '66. The author acknowledges his debt to Jayne Daly, research fellow of the Land Use Law Center, for her capable assistance in preparing this article.

facilities is created. If such a system of regional planning existed, the Department of Transportation, charged with transportation facility planning, could coordinate its efforts with those of local governments that have plenary land use decision making authority.¹⁰ Among capital facility planners of all types there

FOOTNOTES

⁶ For examples of two distinct types of regional planning strategies that do exist in New York, see the Adirondack Park Agency Act, N.Y. Exec. Law secs. 800-820 (McKinney 1982) and the Hudson River Valley Greenway Act, N.Y. Envtl. Conserv. Law secs. 44-0201 - 44-0201 (McKinney 1984 & Supp. 1993).

⁷ A few examples, illustrative of this point follow: the Federal Clean Water Act, secs. 1251-1387 (1986) and the State Pollutant Discharge Elimination System, N.Y. Envtl. Conserv. Law secs. 17-0101 to 17-1907 (McKinney 1984), together regulate the discharge of pollutants into both the surface waters and groundwaters of the state which subjects many development projects to state permitting authority; the National Estuary Program, Clean Water Act, sec. 1330, under which authority a moratorium on land development affecting Long Island Sound has been threatened; the Sole Source Aquifer Protection Act, N.Y. Envtl. Conserv. Law, secs. 55-0101 to 55-0117, under which litigation halted the development of over 200 projects including 12,000 housing units; and the Wild, Scenic and Recreational Rivers System Act, N.Y. Envtl. Conserv. Law secs. 15-2701 to 15-2723, which lists development activities that are allowed and prohibited adjacent to wild, scenic and recreational river areas in the state. For a complete discussion of these and numerous other federal and state statutes that affect local control of land use see, John R. Nolon, *The Erosion of Home Rule Through the Emergence of State-Interests in Land Use Control*, Pace Envtl. L. Rev. Vol. 10, No. 2, Spring, 1993, 497.

⁸ "There will be no solution to transportation and related problems without better comprehensive regional and local land use planning.... Comprehensive, multi-modal and multi-disciplined planning can integrate transportation, air quality, energy, economic, social, environmental and land use goals and objectives, maximizing and leveraging limited fiscal resources to meet Federal, State, regional and local needs. Comprehensive planning and growth management can provide a balance between land use development and the provision of adequate infrastructure, while encouraging economic development and preserving and enhancing our man made and natural environment." 21st Century Mobility, Moving People and Goods, The Transportation Plan for the Hudson Valley, New York State Department of Transportation, June, 1992, 262. This perspective is shared widely. See e.g. *Linking Transportation and Land Use Planning: A Key to Suburban Growth Management*, Resource Manual, 1990/91, referring to reports with similar conclusions prepared in Florida, Maryland, New Jersey, Oregon, and Washington.

⁹ "In order to better integrate Land Use and Transportation, the following recommendations are made for implementation:... Support Comprehensive Planning and Growth Management Legislation to introduce a statewide coordinated planning process for State, regional and local governments." *Id.*

¹⁰ "Under such legislation a State and Regional Planning process would be established consisting of a State



is a deepening understanding that infrastructure development cannot occur without benefit of the type of state-wide system recommended by the New York State Department of Transportation.¹¹

Economic Competitiveness

Advocates of economic growth also call for regional land use planning as a means of avoiding economic stagnation and promoting economic competitiveness. Their reasoning relates closely to that of infrastructure providers who urge that land be developed concurrently with the provision of supportive capital facilities. Private market development is dependent not only on the requirements of local zoning, but also on the availability of supportive infrastructure.¹² Business leaders recognize that fragmentation in land use planning results directly in the fragmentation of economic development.¹³ Their recommendations parallel those of the State Department of Transportation in advocating intermunicipal and regional land use planning.¹⁴

Affordable Housing

The judiciary has called for the adoption of a system of regional planning to protect those in need of affordable housing, the lack of which has been labeled a "crisis" in New York.¹⁵ In 1975, the Court of Appeals wrote: "[I]n enacting a zoning ordinance, consideration must be given to regional needs and requirements.... There must be a balancing of the local desire to maintain the status quo within the community and the greater public interest that regional [housing] needs be met." New York's courts have recognized that regional land use guidelines are necessary to insure the provision of an adequate supply of affordable housing for residents and workers within the region.¹⁶

Environmental Preservation

Similarly, the New York legislature, recognizing that the state's natural environment requires land use regulations that transcend local political boundaries, has passed numerous statutes in an attempt to protect those resources. These laws have eroded the power of local governments to control several critical aspects of land use in their municipalities. For example, the legislature passed

the Adirondack Park Agency Act which places responsibility for land use planning and regulation over one-fifth of the state's land area in a regional agency, the Adirondack Park Agency. The legislature has also affected local zoning authority by prescribing development activities that are allowed or prohibited adjacent to wild, scenic and recreational rivers, which flow through various political jurisdictions. Additionally, under Article 11 of the Public Health Law, the State Department of Health, in conjunction with New York City's Department of Environmental Protection, has the power to regulate land uses over a 2,000 square mile area in order to protect the quality of the city's drinking water system. State legislation also prohibits the development of freshwater wetlands, over 12.4 acres in size, without a state agency permit, regardless of a local jurisdiction's approval of a development proposal. These are but a few examples of a host of recent legislative enactments that preempt, shape or direct local land use authority in the interest of protecting natural resources of regional significance.

Preserving Agricultural Land

The state's overarching interest in preserving farmland and the agricultural economy, an issue of critical importance to New York's rural regions, led to the enactment of legislation, in 1971, providing for state agency oversight of local land use regulations. Municipalities in certain areas are prohibited from unreasonably restricting or regulating farm structures or farming practices unless the restrictions have a direct relationship to protecting public health or safety. More recently, the state legislature found that "agricultural lands are irreplaceable state assets" and that "[e]xternal pressures on farm stability such as population growth in non-metropolitan areas and public infrastructure development pose a significant threat to farm operations...." Under this legislation, regional bodies are given the authority to develop plans for the protection of the state's agricultural lands.

Local Government

Finally, New York's strong tradition of local control of land use has failed to give effective control over the impacts

FOOTNOTES

Comprehensive Plan, State Agency Functional Plans, Regional and Local Comprehensive Plans. Each plan would be consistent with the State Comprehensive Plan. These coordinated planning products would guide the growth management process and provide the necessary linkage between land use and transportation goals. The growth management process would require localities to project their needs for roads, water, sewer and other facilities and ensure that the facilities are funded and constructed concurrently with the growth that they serve." *Id.*

¹¹ In calling for capital facilities to be provided at the same time that the development to be served by such facilities occurs, the New York State Department of Transportation is recommending a general approach to infrastructure planning recently adopted by the state legislature in Florida. The distinguishing ingredient of the Florida state-wide land use system is its "concurrency" requirement. "It is the intent of the legislature that public facilities and services needed to support development shall be available concurrent with the impacts of development." F.S., Chapter 163.3177(10)(h). See Rhodes, Robert M., *Concurrency: Problems, Practicalities, and Prospects*, J. Land Use & Envtl. L., Vol. 6, 241 (1991). Concurrency, under the Florida system, requires that local governments refuse to issue development permits unless the impacts of development will not degrade public facilities and services below established levels of quality. John M. DeGrove, *The New Frontier for Land Policy, Planning & Growth Management in the States*, Lincoln Institute of Land Policy, 1992, 7.

¹² "Most private sector development would not occur without adequate infrastructure." Business Development and Economic Vitality, Westchester at the Crossroads, BDO Seidman, an interdisciplinary study of economic stagnation in Westchester County, New York, 1991, 6.

¹³ "With such a fragmentation of planning development controls, it is increasingly difficult to coordinate business development on a regional basis." *Id.* at 24.

¹⁴ "We believe Westchester is at a crossroads imposing new leadership demands. We need to retain the businesses we have and attract new ones. We need to have realistic government regulation and zoning and more county-wide planning." *Id.* at 31.

¹⁵ "The people of New York State face a housing crisis." Housing in New York, Building for the Future: Report of the Governor's Housing Task Force (1988). See also note 4 *supra*.

¹⁶ "Zoning... is essentially a legislative act. Thus, it is quite anomalous that a court should be required to perform the tasks of a regional planner. To that end, we look to the legislature to make appropriate changes in order to foster the development of programs designed to achieve sound regional planning.... Until the day comes when regional, rather than local, governmental units can make such determinations, the courts must assess the reasonableness of what the locality has done." *Berenson, Id.* at 682.

of land development to localities themselves. No rural municipality is capable of adopting land use policies that will save the rural agrarian land base; this it must do together with other municipalities for the problem of agricultural land disappearance to be solved. Similarly, wild and scenic rivers, wetlands, and air and water quality cannot be protected by the land use policies of individual communities. This they must do in concert with the other municipalities in the relevant ecological system. A climate conducive to economic development and an adequate supply of affordable housing cannot be created by an individual municipality, since these are the products of regional market forces that can only be affected by regional strategies.

Practically, then, local governments have been stripped of their ability to control the critical impacts of land development and to implement important land related policies. Legally, the recent responses of the legislature and courts to regional problems, such as the crisis in affordable housing and serious threats to critical natural resources, have significantly eroded the authority of local governments to control the use of the land.

How can these diverse and often conflicting interests be integrated and accommodated in the land use system? Together, they constitute an interrelated series of interests that must be addressed in unison. Housing and job development must be balanced. Private development of all kinds must be coordinated with the provision of supportive infrastructure by the public sector. The pace and location of development must be carefully measured to prevent the disappearance of farmland and control its impacts on the environment, so that natural resources such as endangered species, water bodies and public drinking water systems are not threatened.

In the New York land use system, there is no provision for the accommodation of these diverse interests. The ongoing conversation about comprehensive planning, envisioned by the framers of the historic land use system, has been silenced. This is so because it must take place today intermunicipally and among the many interest groups that are affected by the outcomes of land use decisions. In several other states, recent

land law reforms have restored to local governments the ability to control these critical land use matters and enabled the discussion about land use decisions to continue among those affected by them.¹⁷ Such initiatives, often called growth management statutes, generally ensure that state and local land use regulations are coordinated with regional comprehensive land use plans. These emerging strategies consider, arbitrate, and promote a wide variety of interests including economic and residential development, infrastructure provision, and the preservation of natural resources and agricultural lands, among others.¹⁸

At a gathering at Cornell University in 1990, a prestigious group of New York land use planners endorsed the general pattern of reform in these other jurisdictions and recommended its consideration by the legislature and governor. The assembly's consensus report asked that a statement of land use planning goals be adopted by the Governor and the legislature; that local plans should be consistent with these goals; that regions be identified throughout the state for regional planning purposes; that counties coordinate local and state planning goals; that state agencies coordinate their programs with such local plans; and that the state provide financial incentives for the development and implementation of plans that are coordinated in this fashion.

Shortly after this statement was adopted by representatives of New York's principal planning organizations, the state legislature adopted a regional planning strategy for the Hudson River Valley that partly responds to the statement's recommendations. In 1991, the Hudson River Valley Greenway Act was adopted, designating ten counties that adjoin the Hudson River, from Westchester to Albany counties, as a planning region. Municipalities in the Greenway region are encouraged by the Act to update their local land use plans and to engage with their neighboring communities in voluntary regional land use planning. The legislation provides for the formation of a regional agency to assist them, technically and financially, with the preparation of these plans.

Among the incentives to localities to participate in regional planning under

the Act is the requirement that state agencies must conform their actions in the region to the provisions of the regional plan. Once a regional plan is adopted under this statute, for example, the State Department of Transportation will be able to ensure that its transportation facility development accomplishes the objectives of the aggregated local plans. In this way, the Department of Transportation is enabled to plan in conjunction with those who possess land use authority, as it has expressed a critical need to do. As important, in this one region of the state, the Act makes it possible for municipalities to reclaim effective local control over land use within the context of a regional planning strategy.

The Hudson Valley Greenway Act is an encouraging sign that the New York legislature is awakening to the land use needs of the 21st century. Despite this beginning, the New York legislature has yet to consider adopting a state-wide system of regional planning guided by a clear statement of the state's interest in responsible land use planning. This legislative inaction continues despite the criticism of the state's court and mounting evidence of discontent among economic interests, developers, housing advocates, farmers, environmentalists, and local officials regarding the weaknesses of the land use system.¹⁹ The emerging consensus that the land use system must be reformed represents an opportunity for the state legislature to study the progress other states have made and to respond to the problems identified by the courts over twenty years ago.

CONTINUED ON PAGE 56

FOOTNOTES

¹⁷ See Symposium, *Growth Management and the Environment in the 1990s*, 24 Loy. L.A. L. Rev. 905 (1991). The following states have adopted growth management statutes: Florida, Georgia, Hawaii, Maine, New Jersey, Oregon, Rhode Island, Vermont, and Washington.

¹⁸ Most of the statewide planning statutes require that the following elements be included in local and regional comprehensive plans: transportation, economic development, affordable housing, environmental and natural resource preservation and agriculture. See Patricia Salkin, *The Path Toward Reform? Growth Management Statutes in Other States*, Coursebook for a Conference on New York Land Law Reform, Chapter 10, Chart J and Table 1, April, 1993.

¹⁹ See McKinsey & Co. Land Use Opinion Survey, *Pace L. Rev.*, Vol. 13, No. 2, Summer, 1993.

Land Use Law Reform: A Judicial and Practical Imperative

CONTINUED FROM PAGE 21


The framers of the historical land use system reasoned that land use regulations should be "in accordance with" comprehensive land planning. In their day, local zoning was the preeminent technique for regulating land use and for shaping regional development patterns. Federal, state and regional regulations

were not a significant factor in land development at that time. Cities and villages were largely distinct and geographically separate centers of population.

Although the framers of this system were less than clear as to how tightly and explicitly land regulations were to be bound to comprehensive planning, the idea was clear: planning, of a scope and level of detail needed to inform and insure the reasonableness of regulations,

was required as a precondition of land use regulation. For this vision to be realized today, local comprehensive plans must be adopted, and they must be responsive to regional needs.

How are local plans to accommodate regional needs when the state itself has not defined regions for planning purposes, has not collected and disseminated relevant regional data, or properly identified truly regional needs? How is the state to move toward regional planning when, at the state level, there is no definition of the state-wide interests in sound regional land use policies?

The state's highest court has called for "[s]tate-wide or regional control of planning." The stakeholders in New York's land use system are increasingly critical of it. Other legislatures have adopted reforms responsive to similar sentiments in their states. It is time for the New York state legislature to respond to the opportunity to enable New York's land use regulators to develop and implement a vision of how and where to grow. 



MEDICAL/DENTAL MALPRACTICE EXPERTS

- ★ **GRATIS TEAM PREVIEW** for merit, causation and liability. We shall confer with you in great detail the intimate clinical issues and standards of care (lab slip by lab slip if necessary) before you capitalize any expert fees. We shall be BRUTALLY CANDID if causation or liability is poor.
- ★ **GRATIS WRITTEN REPORT:** To indemnify your firm should case be unworthy of pursuit.
- ★ **GRATIS CLINICAL REPRESENTATIVES TO YOUR OFFICE:** To convey tactics and arguments typically promulgated by opposing side to indemnify their clients. We proffer no lists of UNIVERSITY TYPES WHO CAN SABOTAGE YOUR CASE. We have earned our reputation prudently for both plaintiff and defense to over 750 law firms since 1986. STAT AFFIDAVITS SUPER RUSH. No physicians or attorneys sit upon our B.O.D. We have no sub-rosa ties to medical schools or allegiance to any carriers. Full disclosure. No court-worn or foreign-trained experts offered. Our basic fee is \$275.

HCAI: Health Care Auditors, Inc.
2 Corporate Drive, Penthouse 690
Clearwater, Florida 34622

Telephone (813) 579-8054
Telecopier (813) 573-1333
We are pleased to receive your calls.