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2009-2011 James D. Hopkins Professor of Law Memorial Lecture: Sustainable Development Law: Keeping Pace

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2009-2011 JAMES D. HOPKINS PROFESSOR OF LAW MEMORIAL LECTURE

Sustainable Development Law: Keeping Pace

JOHN R. NOLON

Welcome. Thank you Dean Simon for that generous introduction. Thank you to the members of the Board of Visitors who are with us and to my esteemed colleagues on our faculty. Welcome to our attorney friends with whom we work and who hire our graduates, and to our local leaders, mayors, city managers, and land use officials and advocates who have been involved in our training or technical assistance projects. A special welcome to our returning alumni and to today's students who have joined us.

Thank you, as well, to my family for being here today and for their support and inspiration. My wife, Anne, is President of Hudson River Health Care, which provides medical services to the uninsured at over twenty community health centers in the Hudson Valley and Long Island – critical work on behalf of nearly one hundred thousand patients who desperately need that care. My son, Sean, the former director of the Land Use Law Center and a Pace grad is here from Vermont Law School, where he is a tenure track professor and runs its nationally-recognized Alternative Dispute Resolution Program. My daughter, Jennie, is a staff attorney with our Land Use Law Center where she directs our urban revitalization and green building programs, which she helped us develop as a master's degree student in the Yale Environmental Studies School and through her work as a Pace J.D. student. Also in attendance are our goddaughter Catherine Dimas, who directs the Americorps Program at Hudson River Health Care, and Mariana Rios, who is our young housemate and a bilingual social worker with Anne's Health Center. My friend and brother-in-law, Jonas Kauffman, is also present, having travelled today from Lancaster County, Pennsylvania where he is

a financial planner and deeply involved in serving his church and community. I am buoyed every day by their energy and commitment to those less fortunate and to social and legal issues of real importance.

Other members of my extended family are the managing directors of the Land Use Law Center, Tiffany Zezula and Jessica Bacher, also graduates of Pace Law School and clever and strong directors of the Center; Ann Marie McCoy, our Administrative Assistant of over a decade – the rock on which our day-to-day operations rest; our newly arrived Graduate Fellow, Meg Byerly, a joint degree holder from Yale and Pace Law; and Sam Capasso, our Research Scholar, who is one of the first candidates for Pace Law School's new Master's Degree in Land Use and Sustainable Development Law.

Also here today is a special group – a branch of the Land Use Law Center family. They are the former interns and students, now proud Pace Law School alumni, who worked with us while they were here. They represent members of every Pace Law School class from 1996 forward. Stand, please, and be recognized. This lecture is dedicated to you.

I will shortly turn to an attempt to define the field of sustainable development law primarily by referring to the work that these alumni did while in school. I will limit my analysis to what those in the audience did, not the whole crew of students who have worked with us over the years, just this hardy bunch. This is an unusual but highly empirical and practical way to describe an emerging field of law. It reflects on our scholarship and teaching, which is what the Hopkins Chair honors. The Hopkins Chair reflects the legacy and leadership of Judge James D. Hopkins, who was critically and effectively engaged in legal practice, the judiciary, and legal education.

THE LAW AS AN AGENT OF CHANGE

First, some background. These graduates and today's upper-division students showed up on our doorstep during their first day of class in property law saying, "Professor, show me the rules." They had the idea that the law was composed of a fixed

set of standards and that it was my job to simply take them through the rulebook. They were greatly disappointed.

On the first day of class we encounter a fox. We start property with *Pierson v. Post* for a reason. Pierson, the son of an Englishman, unceremoniously shot the fox that Post and his Dutch buddies had been chasing from the crack of dawn with hounds and horses and, in their opinion, were about to catch. The court awarded title to Pierson because he got physical control first. In so doing, the court, in this 1805 New York case of first impression, looked to the Roman and common law, found the law of capture, and applied it to the facts at hand.

By the end of the first week of property law, the students have learned that the law of capture has been applied to determine the ownership of gas, oil, groundwater, and surface water. These resources, in one sense, are like foxes and other wild animals: they are fugitive and wandering. "Wait," the students say, "wild animal law can be used to determine who owns gas?" Yes, indeed it can. The law of capture holds that if you capture a fox and it escapes, you lose title. Students study a case that holds that if you pump gas underground and it escapes into the neighbor's underground caverns, you lose title and the neighbors are free to pump it out and sell it. They also witness a court completely changing the rules, from an absolute view of groundwater ownership to a relative rights perspective, all because science matured and figured how groundwater works, which rendered previous common law rules antiquated. They explore two centuries of legal progress in the first week of class and witness natural resource law evolve as the nation expands and encounters more complex problems.

By the end of the semester in property law, after probing the two dozen estates in land that emerged out of the ancient common law and baffling students with the Rule Against Perpetuities, we cover land use law. We explain that one can own title to dozens of estates and interests in property, but that this ownership is subject the law of the land, including regulations adopted by state and local governments, through zoning and related standards.

The students learn that zoning was invented in America in 1916 and that zoning spread like wildfire from New York City to

Euclid, Ohio. By the time that the Village of Euclid's zoning ordinance was found constitutional by the Supreme Court in 1926, over five hundred cities had adopted it. By the end of the 1930s, the legislatures of all states had delegated zoning power to their local governments and, in every state in the nation, cities had adopted zoning as the method of choice to direct the development of their communities, support property values, and protect the public health and safety.

Here is a little known quote from the Supreme Court's decision in *Euclid*:

Until recent years, urban life was comparatively simple: but with the great increase and concentration of population, problems have developed, and constantly are developing, which require. . . . additional restrictions on the use of private lands in urban communities. . . . [I]n this there is no inconsistency, for, while the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise.

This was not a new thought in 1926. Churchill wrote this in the *HISTORY OF THE ENGLISH SPEAKING PEOPLES*: "Lawyers of the reign of Henry II read into the statements of their predecessors of the tenth century meanings and principles which their authors never intended, and applied them to the novel conditions and problems of their own day."

So what about sustainable development law? We are very concerned by the hard scientific evidence that is mounting about the disappearance of natural resources and the growing threats to our planet. Foxes are in trouble, supplies of gas are limited, and our potable water is finite and increasingly polluted, all at a time of unprecedented population growth in America. If the law cannot change as quickly as the world is changing, we may be in trouble.

What are the challenges that this area of the law is meeting and will meet in the decades ahead and how will the law and our graduates keep pace? This is where the stories of our past and future students come in. Let's start with a retrospective.

THE LAND USE LAW CENTER AND ITS STUDENTS

The Center was founded in 1993. What it would become is best reflected by something that happened in 1998, when Jeff LeJava was a student. One day he came to me and said, "Professor take a look at this local law; it seems to be an environmental law." I said, "Jeff, we know that environmental law is federal. There are dozens of federal laws that define it." He said, "I know, but this local law seems to be designed to protect the spotted salamander and its wetlands habitat, and it seems like some kind of a breakthrough." So I looked and realized that he was right.

Jeff was working with a team of students that year that put together a two hundred-page report documenting what we came to call the advent of local environmental law. Our first article on the subject was coauthored by my research assistant, Kristen Kelly Wilson. We then organized a symposium on the subject, inviting several distinguished professors to our school to comment on what we had learned. We published their papers in a themed issue of the *PACE ENVIRONMENTAL LAW REVIEW*. Katie Plunkett, a 3L, worked with a giant in the field of land use law, Professor Dan Mandelker, on his article. She did such a good job that he suggested that she publish the article under her name alone. These early publications led to three books published by the Environmental Law Institute and a few more law review articles that firmly established the notion that local governments can act effectively under law to protect local natural resources and the public health.

In doing this work, my students and I observed how local environmental regulations balanced the economic interests of developers whose projects were subject to the local land use legal system. This embodies two of the principal tenets of sustainable development law: economic development and environmental protection.

The background to this burst of research and scholarship has a lot to do with the advent of sustainable development law itself. In 1992, an unprecedented number of nations and their heads of state met in Rio de Janeiro and signed a number of documents including the Rio Declaration – the equivalent of a land use plan for the planet – and Agenda 21, which was its implementation

program. We established the Land Use Center in 1993 and immediately got involved with the issues discussed at Rio. President Clinton's response to Rio was to set up a Council on Sustainable Development, which picked our Center in 1995 to do a study on the Hudson Valley and to determine whether, if we continued business as usual, the valley would be sustainable in fifty years.

We looked at the sprawl that was consuming the valley's land and resources and determined that no, it would not. The valley's open space would shrink from seventy percent of the land in 1995 to thirty percent by 2045 and this, we easily concluded, would not be sustainable; it would not be economical, environmentally acceptable, or equitable. This would violate the three principles of sustainable development law as it was defined in Rio. The President's Council asked us what we would do to promote sustainability and we said train local leaders, since local governments in New York and most states have nearly plenary power to decide what goes where on the land. So, in 1996, we started a four-day training program now known as the Land Use Leadership Alliance Training Program.

During this time, we wanted a closer look at the international scene and so I applied for a Fulbright to go to Argentina because that country had just adopted a constitutional commitment to sustainable development. We wanted to know what that meant and how they would implement such a legal commitment. Mike Murphy and Sean Nolon were students at that time and they, too, were interested. Sean volunteered to go to Argentina, meet with environmental NGOs and agencies, and find out what was happening to the country's environment as a backdrop to understanding why they adopted sustainable development as a constitutional imperative.

Sean wrote an article on his observations and I talked several Argentine lawyers and conservationists into doing articles on the subject. Mike Murphy, then Articles Editor of the *PACE ENVIRONMENTAL LAW REVIEW*, committed to do a themed edition including these articles and wrote a foreword that summarized and made sense of what we learned from these articles and this experience. This was in 1996.

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Ten years later that comparative law exploration was continued in cooperation with the IUCN and its annual environmental law meeting in Kenya. We were engaged to write two books on comparative land use law for sustainable development, which were ultimately published by Cambridge University Press. Michelle Greenbaum was one of four students who worked one summer learning about the similarities and differences among continents and countries as they pursue sustainability using their power to regulate the land and protect natural resources.

ENGAGED LEARNING

We came to label the type of work we did with Jeff, Kristen, Kelly, Sean, Michelle, and Mike “engaged learning.” They were involved in critical observations regarding the movement of the law and how it worked in applied circumstances. This is an approach to education that many of my colleagues share. It answers critics of law school who ask for evidence of the value that law schools add to their students’ education and to the firms and agencies that hire them.

By the end of the 1990s, we were well underway, training local land use leaders in the Hudson Valley and engaging students in research to answer their questions, like “How do we preserve our farms in the face of sprawling development?” Sean and Cozata Soloway wrote and published an article on the law of farmland preservation. This article foreshadowed the today’s emphasis on local food production that cuts down the energy costs of food transportation and betters the health of urban populations.

The leaders we were training also asked how is it that New York City can control land use in the City’s vast upstate drinking watershed. Heather Andrade Spitzberg figured this complex matter out, wrote and published an article explaining it, and thus educated lawyers and leaders about this remarkable watershed protection strategy, which is part of sustainable development law. In 2006, Victoria Polidoro researched transfer of development rights programs and issues and answered the questions of leaders from rapidly developing Dutchess County who wanted to use transfer of development rights to move development from fragile

environmental areas to crossroads, hamlets, and other urbanized neighborhoods where greater density could be accommodated, achieving sustainable development.

We asked our students to write for the leaders we were training so that the students could learn how lawyers communicate complicated legal matters to their clients. By 1998, the students had created the Gaining Ground Database and posted a few dozen exemplary local laws on the database that they found and abstracted. Today, there are over two thousand of these ordinances in the database, all abstracted and organized into over one hundred subcategories of sustainable development law.

Erin Derrington, a joint degree student with Yale, entered ordinances she found on transit oriented development, sea level rise, and green building laws. Students like Courtney Boniface expanded our knowledge by writing about land use law in other states. She compared the law of New York with that of New Jersey and Connecticut. Mike Vatter wrote about land use law in the state of Massachusetts, while other students wrote about most of the other fifty states, looking for the authority that state and local governments have to achieve sustainable development. Kory Solomone took reports that students like Jessica Bacher, Tiffany Zezula, Katie Plunkett, and Kristen Kelly Wilson had prepared, and summarized them in a book we call the *GAINING GROUND GUIDEBOOK FOR LOCAL LAND USE LEADERS*. This book has been handed out to most of the two thousand local leaders we have trained in the Land Use Leadership Alliance Training Program. Josh Rhinesmith was an editor of, and Carrie Hilpert a contributor to, our book *BREAKING GROUND, PRIORITY GROWTH DISTRICTS*, which we use to explain to leaders from developing suburbs how to grow more sustainably in appropriate places.

By 1999, we had amassed considerable material for local leaders that lent itself to classroom teaching. That year, with Jen Porter's help, we produced a New York land use law casebook and taught it in our land use class. In 2007, Ann Matthews helped me produce a Thompson/West Nutshell on land use law to explain the material contained in every land use casebook used to teach the topic in American law schools. Ann then helped me revise our own Thompson/West casebook on land use, which follows the

outline of the topic that we developed for the Nutshell—our version of the land use law canon.

By 2008, we knew that we needed a new capstone course for our upper division students. Ann Matthews helped me develop two volumes of material for a course we call “The Lawyers Role in Sustainable Development.” My research assistant today, Mike Goonan, is helping us to transform the casebook Ann helped edit into the first law school casebook on land use and sustainable development law, after helping me write another Nutshell on climate change and sustainable development law.¹

Practicing lawyers, like local officials, also wanted to know what we were learning. In 1998, Mary Beth Monach edited a land use deskbook for lawyers, which sold out three times before it became *WELL GROUNDED: USING LAND USE LAW TO ACHIEVE SMART GROWTH*, edited by Heather and published by ELLI. In response to questions from the bar, Don Sandford wrote a research paper that reveals in detail the strengths and pitfalls of New York’s environmental review statute and charted the road to reform. We have conducted over three dozen CLE courses and, each time, have asked students to produce useful materials for participating attorneys. Liz Cassidy and Joseph Cessario, with help from Rick Fiore and John Vassulo, produced two book-length sets of CLE materials on real estate law, a field of law that is now infested with green development practices.

SUSTAINABLE DEVELOPMENT LAW

Our starting point for describing sustainable development law is that it has much to do with where people live and how we build to accommodate them. We use research conducted in the Chicago Metropolitan Area to illustrate this point. Using the production of CO₂ as a criterion for measuring sustainability, this research explains that the residents of the City of Chicago emit seventy percent less CO₂ per capita than their suburban counterparts.

The people in Chicago proper drive less; they are responsible for fewer vehicle miles traveled. They live in more thermally

1. My valued colleague at Albany Law School, Professor and Associate Dean Patricia E. Salkin, is coauthor of these casebooks and Nutshells.

efficient buildings that take less material and energy per household to build, and these buildings consume less energy, hence they use less electricity. On a per capita and per household basis they occupy less space, are responsible for less pavement and therefore less flooding, and use less potable water than their suburban and exurban counterparts. Their city lives are, in these many ways, more sustainable.

Our population will grow by over thirty percent in thirty years and to the extent that these new residents choose to live in cities they will contribute less to climate change and environmental degradation by living in more sustainable settlements. Understood in this light, sustainable development law involves legal strategies that promote transit oriented development, green infrastructure, green buildings, and livable neighborhoods in cities, as well as all efforts to revitalize cities so that they attract a larger percentage of our growing population.

From an environmental perspective, sustainable development uses less material, avoids consuming wetlands or eroding watersheds, consumes less energy, emits less carbon dioxide, lessens stormwater runoff, reduces ground and surface water pollution, and creates healthier places for living, working, and recreation. This body of law is created mainly by state and local governments, which have the principal legal authority to regulate building construction, land use, and the conservation of natural resources at the local level. It is guided, supported, and, sometimes, preempted by federal laws, regulations, and spending programs. The U.S. has subscribed to international conventions that define its obligations as a citizen among other nation states to grow sustainably.

By 2005, we at the Land Use Law Center had witnessed development projects cropping up in nearby cities and the clever application of old law by today's urban law practitioners. In response, we wrote a book called *REINVENTING REDEVELOPMENT LAW*, which examined these new approaches. It contained case studies of progress in several cities. Noelle Crisalli edited that book, Dan Pennessi, wrote several chapters and a case study, Joe Cessario and Josh Rhinesmith both did chapters, and Kory Solomone did a case study.

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This work built on previous research that Luke Hilpert conducted on development incentives and on the organization, functions, and legal nature of intermediary corporations such as urban renewal agencies and industrial development agencies. Dan Laub helped build the foundation for this work with his research on smart growth legislation in Maryland and other states. Smart growth is one of the threads that sustainable development law picks up and weaves into a larger tapestry of law.

As a student, Jennie Nolon noticed that the number of cities adopting transit oriented development regulations and green building laws was picking up. She researched, catalogued, and described transit oriented development and green building laws throughout the country. There are over eighty five such local ordinances on our Gaining Ground Database as a result of this work. Jennie joined Seth Mandelbaum to become the first Pace Law School graduates to become accredited as LEED professionals.

MANAGING CLIMATE CHANGE AND HUMAN SETTLEMENTS

In 2008, we began an investigation into how climate change law fits within the body of sustainable development law that we were observing. In 1992 at Rio, the parties also signed the UN Framework Convention on Climate Change and began a permanent process of holding conferences of the parties resulting in the Kyoto Protocol, the Copenhagen Accord, and the Cancún Agreements. We learned that climate change was a fundamental preoccupation of the UN Commission on Sustainable Development and its report, *Our Common Future*, which defined sustainable development in 1987 and set the stage for Rio.

We decided to focus on human settlements and their design and function as a method of mitigating and adapting to climate change. We have now spent three years finding out everything that we could about sustainable development and climate change, starting with a spring seminar of ten students that included a close look at the trend in local government adoption of building and land use standards to mitigate and adapt to climate change. This culminated in an article for WILLIAM & MARY

ENVIRONMENTAL LAW AND POLICY REVIEW, two articles for the American Planning Association's legal journal, two articles on green building law, and a Nutshell on climate change and sustainable development. Meg Byerly, now our Graduate Fellow, and Kelly Belnick, the Editor in Chief of the *PACE ENVIRONMENTAL LAW REVIEW*, were singularly responsible for this work. Kelly is currently leading her team of senior editors in developing a themed issue of their law review on sustainable development law, made up of articles written by some of the most engaged scholars in the country.

Meg has just finished a superb annotated bibliography on major research on the topic of human settlements, infrastructure, and climate change, which I will take to Calcutta in the spring when I attend an Experts Meeting of the Intergovernmental Panel on Climate Change on the topic. The IPCC wants to know if there is enough research available to support a chapter or two in its Fifth Assessment Report on mitigating climate change through the proper design and development of global settlements. Our answer is yes, and our proof is in the work of these seminar students and the interns and research assistants who have documented what is happening in this field.

Our students anticipated this question nearly a decade ago. In 2001, Tiffany Zezula and Jessica Bacher, now the Land Use Law Center's senior managing attorneys, asked why the law permits buildings to be rebuilt on barrier islands following hurricanes. They did research into applied land use law, probing concepts such as moratoria, rezoning, beach zoning, nonconforming uses, amortization of nonconforming uses, and regulatory takings, and published an article called *The Beach Zone*. They were at the early breaking point of a wave of legal research and writing that explores adaptation to climate change. Today, Jessica serves on the Legal Advisory Committee of New York's Sea Level Rise Task Force. Just this week, she and Tiffany, through our Land Use Leadership Training Program, are training local leaders who are now greatly concerned with this issue.

In 2007, we held seminars here, at Yale, and at San Diego Law School on these issues, focusing on disaster planning and prevention. The materials for those seminars were introduced by

an article that Jennie Nolon wrote summarizing what our students had learned in doing case studies and research on local responses to natural disasters. This eventually became another ELI book called *LOSING GROUND: A NATION ON EDGE*.

LESSONS LEARNED

Through these activities over the years, we have learned that cities must become more livable through well designed and energy efficient buildings, must remediate their distressed properties, and must have greener neighborhoods. We have learned that the law can help them.

We have learned that cities can grow sustainably through fostering transit oriented development and by adopting sustainable development regulations and incentives. We have learned that the law can help them.

Another lesson is that older and developing suburbs can become more walkable and sustainable by developing in priority growth districts and using local environmental laws to preserve natural resources associated with the open space that they still enjoy. Again, we have learned that the law can help them.

The law can help exurban communities to produce our food supplies and maintain forests and fields that can sequester more than fifteen percent of the CO₂ that our country emits. It can also help coastal communities become more resilient in the face of more fierce storms and adapt to sea level rise.

Does sustainable development law include environmental law? Yes. Real estate law? Yes. Land use law? Yes. Energy law? Yes. Climate change law? Yes. Insurance law? Yes. Insurance law! Really? Yes, because of the risks that come with climate change the provisions of insurance policies are being redrawn. What about securities law? Yes, the SEC is requiring climate change risk disclosure in the filings of publicly held companies.

While the ideologically motivated debate the existence and extent of climate change, these serious fact-oriented agencies have accepted its risks as real, as have our military generals and the justices of the U.S. Supreme Court.

This fall, Sam Capasso picked up work done by Justin Birzon this summer on the practice of sustainable development law and about scholarship on the topic. Five years ago, we could find very few law firms that advertised themselves as having a sustainable development law practice. Justin and Sam found nearly a hundred generally dispersed throughout the country at this time.

They looked at emerging scholarship regarding sustainable development law. Ten years ago, leading scholars were writing two or three articles a year on the topic, mostly focusing on the structure of the legal system and trying to find coherence. Today, there are dozens of articles a year and most dig deeply into sustainable development and related topics such as water pollution, watershed management, habitat preservation, urban revitalization, transit oriented development, or green building.

THE FUTURE

In today's environment, Pierson's fox is an endangered animal. Some say that law schools are in trouble too.

The MacCrate and Carnegie Reports and the emergence of best practices for teaching skills in law school are challenging Pace and other law schools to truly prepare students for the practice of law as it will evolve during their careers. Our students' parents were fifteen years old when the population of the U.S. reached two hundred million. Our students were graduating from college when it reached three hundred million. By the time they have been in practice for thirty years, the population will be four hundred million. The addition of one hundred million new residents will cause the private sector to build millions of new homes and billions of square feet of nonresidential buildings. When law school graduates look around their communities in thirty years, sixty six percent of the buildings they see will have been built between now and then. Sea levels may have risen by a foot to a foot and a half, and, according to a recent report of the UN Summit on Millennium Development Goals, perhaps twenty thousand species existing today will be extinct.

How do we prepare our students for such a future? First understand that they believe that an unsustainable planet is

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impossible, as difficult as wrenching sustainable development from the jaws of business-as-usual will be. When you work with students it is impossible not to be optimistic about the future.

Our program of engaged learning puts students at the epicenter of change in the law. They participate in finding out what new laws are being adopted, analyzing them and writing about them, communicating about them to relevant “clients,” and trying to figure out how things are evolving and how to create needed change.

We cannot know the challenges they will face and when they will face them, but they will be prepared because they have been engaged in today’s challenges. They have not experienced law school as an exercise in abstract learning, in studying the rule book of several closeted fields of law, or in worrying too much about how judges decide cases at the end of years of costly litigation.

Pierson and Post should not have sued each other, however much we needed the legal precedent. The loser had to sell his house to pay the legal bills. The winner walked away with a dead fox. That type of inefficiency will not serve us well in an era of scarce and threatened resources. We have established the Kheel Center on the Resolution of Environmental Interest Disputes to train students and lawyers to create new venues and new processes for resolving conflicts about resource use and development in the 21st Century. Erin Honaker worked with us for two years as our Kheel Scholar to sponsor conferences, find speakers, develop materials, and organize presentations on new methods conflict resolution. She also participated in a new seminar we organized on environmental dispute resolution.

We are learning new approaches through engagement. This story demonstrates that this is not my work but ours. I share the honor and responsibilities of this Hopkins Chair with the staff of the Center, our alumni, and our students, whose work we honor today.

Thank you.