

**PROTECTING THE
ENVIRONMENT THROUGH
LAND USE LAW:
STANDING GROUND**

by
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Design Commentary by Robert N. Lane, RA

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About the Author

John R. Nolon is Professor of Law at Pace Law School and is Counsel to the Law School's Land Use Law Center. He has been an Adjunct Professor of Land Use Law and Policy at the Yale School of Forestry and Environmental Studies since 2001. In 2009, he received the National Leadership Award for a Planning Advocate by the American Planning Association; in 2014, the International City/County Management Association presented him its Honorary Membership Award, its highest honor for a person outside the city management profession for his exemplary service to local government. He served President Carter's Council on Development Choices for the 1980's, President Clinton's Council on Sustainable Development, New York Governor George Pataki's Transition Team, and Governor Elliot Spitzer's Transition Team. Professor Nolon received a Fulbright Scholarship to develop a framework law for sustainable development in Argentina where he worked from 1994 through 1996. He has published four books for the Environmental Law Institute and is co-author of three books for Thomson-West: the nation's oldest casebook on land use law, *Land Use and Sustainable Development Law: Cases and Materials*; *Land Use in a Nutshell*; and *Climate Change and Sustainable Development Law in a Nutshell*.



Author's Preface and Acknowledgements

The idea for this book arose when the Environmental Law Institute (ELI) proposed that I update four books of mine that it published over the last dozen years: all with “Ground” in their title. This publishing journey with ELI began in 2001 with *Well Grounded: Using Local Land Use Authority to Achieve Smart Growth*, which celebrated the democratic foundation of local land use law and the many local land use plans and laws that properly order growth, while recognizing the jurisdictional limits of the nation’s 40,000 local governments and the fact that many of their zoning ordinances induce sprawl, rather than smart growth. *Well Grounded* was to serve as a best practices manual, helping more localities make proper use of their legal authority to balance growth and conservation and urging state and federal policymakers to assist.

Two books followed that described municipal efforts to use land use authority to protect natural resources and environmental functions: *Open Ground: Effective Local Strategies for Protecting Natural Resources* and *New Ground: The Advent of Local Environmental Law*. These books demonstrated how effectively and expansively local governments can protect watersheds, wetlands, habitats, species, and other natural resources and serve as full partners of state and federal agencies in managing stormwater, limiting surface and ground water pollution, and controlling many of the adverse effects of nonpoint source pollution.

The last in the series was *Losing Ground: A Nation on Edge*, published in the horrific wake of Hurricane Katrina: a book that examined the failed national legal system that leaves localities ill-served as they sift through the ruins of natural disasters, managing recovery and planning for the future as the level of government that is closest to the people and property affected.

All of these books urge lawyers and planners, as well as those who teach law and planning and their students, to understand the importance of local land use law in our federal system of laws, and to help create an integrated approach to environmental protection that fully incorporates the competencies of each level of government.

Rather than update each of these publications, it seemed more prudent and strategic to integrate all four in a single book, informed by my subsequent publications, which have attempted to define Sustainable Development Law and its enormous potential to mitigate and adapt to climate

change. The result is this volume: *Protecting the Environment Through Land Use Law: Standing Ground*. From Chapter 1 to the book's conclusion, we examine the local environmental legal system's struggle to balance the forces of growth and development with the strong American ethic of conservation.

I write "we" for a reason. This book bears the indelible fingerprints of all five of the staff attorneys who work at the Land Use Law Center at Pace Law School and many of the students who work and study at the Center. This is "our" book; all royalties go to the Center to support the continuing work of its staff and students.

Each of the Center's staff attorneys has extensive experience advising local governments how to reform their laws to balance conservation and development. Together, they have worked and written on many of the subjects covered in this book. Their knowledge is evident in my reflections, which are greatly informed by their efforts and insights. The overall theme of the book and much of Chapter 1 comes directly from the materials that Adjunct Professor and Senior Staff Attorney Jennie Nolon Blanchard uses to teach students in her summer land use externship program, which functions as a clinic that involves students with the many programs and research projects of our Center. Executive Director and Adjunct Professor Jessica Bacher contributed research and case studies to the discussion of local efforts to respond to sea level rise and storm surges in Chapter 6. Senior Staff Attorney and Adjunct Professor Jeffery LeJava's work regarding urban agriculture and green infrastructure expanded my understanding of the topics covered in Chapters 7 and 8. The work of Deputy Director and Adjunct Professor Tiffany Zezula helped inform the approach I took in exploring the mediation of land use disputes in Chapter 10. Additional thanks are owed to former Executive Director, now Associate Professor at Vermont Law School, Sean Nolon, for allowing us to use material in Chapter 10 from his Lincoln Institute of Land Policy publication, *Land in Conflict*, and to former student Kathryn Plunkett, now at Sullivan and Cromwell, LLP, for her work on the use of environmental impact review by local governments to mitigate the adverse impacts of development projects on natural resources.

In addition, nearly two dozen Pace law students have helped us research and edit this volume, making it possible to update and expand the explorations of the first four publications. Steve Gavin and Allison Sloto, who served as my research assistants during the past three years, deserve special mention. Steve sorted and sifted through the first four books and my related law review articles to create a coherent outline for *Standing Ground* and organized materials in preparation for drafting its chapters. Allison then worked with me

nearly every day for a year as we wrote, reworked, and finalized the 10 chapters. She edited my work, helped to correct course at several critical junctures, and supervised the other students who helped us update and expand my earlier writings. Allison also managed the efforts of student editors Anne Haas, Roisin Grzegorzewski, and Kelly Nishikawa, who also checked and corrected the endnotes in each chapter, thus earning my everlasting thanks.

Listed alphabetically, these additional students lent a hand while working as externs, seminar participants, or volunteers; many of them contributed meaningfully to one or more of *Standing Ground's* chapters: Matthew Cleary, Cayleigh Eckhardt, Wesley Dyer, Katherine Fiedler, Elyse Foladare, Drew Gamils, Cassia Horvitz, David Kenny, Stellina Napolitano, Anthony Papetti, Elizabeth Rubenstein, Michael Sargo, and Marissa Weiss.

There are two forewords to *Standing Ground*: one written by a distinguished legal scholar deeply versed in municipal and land use law; the other by an equally distinguished regional planner and urban designer, with vast expertise in counselling municipal officials in balancing landscapes. They speak to the two professions that are challenged to guide localities to use their state-delegated authority to control sustainably the use of private land. This book is jointly published by an environmental and a law book publisher and will be marketed, in part, by the American Planning Association.

Our staff's work in the field has placed them alongside literally thousands of local land use leaders whose innovative strategies and hard work are transforming their buildings, neighborhoods, and communities. They too—these leaders and the members of the two professions that support them—are the “we” who have contributed to this book. Without the inspiration of their progress, I would never have started this journey.