

**CHOOSING TO SUCCEED:
LAND USE LAW &
CLIMATE CONTROL**

John R. Nolon

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About the Author



John R. Nolon is Distinguished Professor of Law at the Elisabeth Haub School of Law at Pace University where he teaches property, land use, dispute resolution, and sustainable development law courses and is Counsel to the Law School's Land Use Law Center, which he founded in 1993. He served as Adjunct Professor of land use law and policy at the Yale School of Forestry and Environmental Studies from 2001-2016.

Professor Nolon served on 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. 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. The NY Planning Federation presented him its Lifetime Achievement Award in 2018. He is on the advisory boards of the Sustainable Development Code, the NY Planning Federation, and the Westchester/Fairfield chapter of the Urban Land Institute.

Professor Nolon received a Fulbright Scholarship to develop a framework law for sustainable development in Argentina where he worked from 1994 through 1996. A collection of articles produced as a result of this work appeared in a symposium edition of the *Pace Environmental Law Review*. He has produced five books published by the Environmental Law Institute on the topics of land use law, open space protection, local environmental law, and the mitigation of damage caused by natural disasters. A prolific writer, he published nearly 50 articles in the *New York Law Journal* and over 60 law review articles on various aspects of land use and sustainable development law. Professor Nolon is also co-author of the nation's oldest casebook on land use law: *Land Use and Sustainable Development Law: Cases and Materials*, currently in its ninth edition.

Acknowledgments

Choosing to Succeed contains over 1,200 footnotes citing important sources of information that support its positions. Its chapters refer to over 80 cases that chart the trajectory of judicial decisions regarding climate change and the use of the land.

I can't count how many students contributed to this volume, but it is an important number. Dozens of Haub Law School students over the past three years wrote papers for me in classes and seminars, did small research papers on individual topics, and helped me prepare for law school workshops, symposia, and conferences. They found and briefed the 80 cases and they found, explained, and cited the 1,200 sources.

In the last year, two outstanding research assistants helped me organize all of this into eight chapters for this nearly 300-page book. I am indebted to Haley Brescia and Jessica Roberts for this partnership. Whenever I asked them to help me with a task, they said "of course" or "sure thing" and delivered soon and expertly. Their positive attitude was shared by the dozens of students who contributed to this book: they have chosen to succeed and, if their attitude is contagious enough, we will.

It is during these students' time as practicing lawyers that we must mitigate the causes and adapt to the consequences of climate change. Having learned so much from creating *Choosing to Succeed*, they join me in hoping that this book will help its readers learn how to use the law to foster meaningful and much needed change.

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Foreword

Bubble Trouble

In late August 2017, the outer bands of Hurricane Harvey were still wringing out the last of 50 inches of rain on downtown Houston when—with up to one-third of the city still underwater—an investigative piece in the *The Washington Post* suggested the real target of blame for the deluge that would become the most expensive storm in U.S. history. The fault lay not in our stars or the wanting response of an under-sourced FEMA. The real villain, according to the *Post*, was *bad planning*—or as the headline put it, “Houston’s ‘Wild West’ Growth.” One can hardly disagree. The largest U.S. city to have no zoning laws had indisputably courted fate, steering sprawled neighborhoods into flood plains and paving over the last postage-stamp lots of absorbent soil. It turns out that Houston residents—so far-flung and so often trapped in traffic congestion—were also among the most ardent emitters of greenhouse gases (per capita) on earth.

It seems the nation’s “Space City,” a vibrant symbol of American progress, had been swiveling on a bubble. And before anyone knew it, that bubble popped—to the tune of 68 lives lost and \$125 billion in damage. I say, “before anyone knew it,” but that’s just an expression. The trouble with bubbles is not that you don’t know you’re on one, but that you don’t want to do anything about it yet—not while the bubble is floating so high and expanding so much. Not while its iridescence is so mesmerizing to people on the surface.

As John Nolon points out in this wonderfully informative and highly readable book, millions of us around the country are also living on bubbles that, as in Houston, are just waiting to burst. The reasons are many, related to increased flooding, sooty air, heat stress, water scarcity, shrinking biodiversity, and more. The climate crisis backlights almost all of this. We’ve heard the warnings: our climate system is quickly unraveling. The breakdown can be traced to a primary human cause: the release of greenhouse gases, most notably, carbon dioxide emitted from burning fossil fuels. Thus the world we inhabit is getting hotter, drier, wetter, and weirder. Our coastlands are sinking. Forests are bursting into flame. Droughts and heat waves are getting worse. Rain patterns are see-sawing across the continent and in many other

parts of the world. We've heard this from a consensus of the world's climate scientists, from farmers whose families have plowed land for generations, from U.S. federal courts and judicial tribunals abroad. We hear this from the Pope. And we know that, absent some ambitious intervention, the climate's Great Unraveling will accelerate.

What you might not know is that an essential key to the intervention we need sits in the lap of your local government. Whether learning to cope with more fires and storm or deploying green energy to cut carbon pollution, much of the action is at the municipal level. There are a few reasons for this. First, the physical infrastructure involved is often dependent on internal planning rules and the characteristics of local geography. Second, it's generally easier to rally public support for projects that deliver tangible benefits at the local scale than those that do not. Finally, opening inclusive channels for public discussion, participation, and leadership is much easier on the ground floor.

That said, local government planning is almost always a frustrating exercise. The costs come early, the benefits late. In the case of climate change, it is sometimes hard to know exactly what you are planning for. Will the storms be more intense, or more frequent, or both? Are we talking two feet of sea level rise or eight? Will the atmospheric rivers propelling West Texas windfarms continue unabated or peter out as warming air currents realign? Add to this the paradoxical fact that politicians seem to get more credit for *responding* to climatic disruptions than actually avoiding them. After all, emergency response implies leadership and action. Prophylactic planning comes mostly in the form of restrictions and denials—attacks on basic freedom. But it shouldn't be seen that way. There is freedom in having a home to return to when the floodwaters drain, or a road that is passable when you need an ambulance. There is freedom in flipping a switch and having the lights come on.

Championing such freedom is what Professor Nolon calls "choosing to succeed." Part of that means harnessing municipal governing structures to abate carbon pollution by retooling transportation systems and greening the grid. But Nolon makes clear we need to reach *beyond* cutting carbon, toward a basic goal of *climate resilience*. That means being able to "bounce back" from the climate disasters we can't avoid. Or as an expert might say, managing and recovering from a climate impact in a way that allows a community to learn, adapt, and *thrive*.

Over the last 30 years, most strategies to address climate change did not fully embrace resilience, focusing much more on reducing greenhouse gas emissions. There were reasons for this. Because greenhouse gas emissions

were the cause of the problem, it seemed to many that it was more important to attack that problem first. Girding ourselves for the leftover risk could come later. A second reason was that, as compared to climate resilience, the transition from fossil fuels to renewable energy made for a more straightforward conversation. Replacing dirty energy with clean energy turns out to be a complicated problem when you dig into it; but the focus is pretty clear: changing the way we produce energy. Climate resilience, on the other hand, involves nearly everything: infrastructure; wildlife management; disaster response; agriculture; public health; and more. Squeezing that subject into a manageable size was like trying to fold an octopus into a box.

Finally—and this is a big point—years ago a lot of environmentalists saw climate resilience as a drooping white flag. They thought that talk about elevating homes and expanding drainpipes was admitting defeat or, worse, giving Big Oil permission to do nothing and say the risks were manageable. In his 1992 best-seller, *Earth in the Balance*, Al Gore even called efforts to adapt to climate impacts a “kind of laziness.” (Gore later reversed that characterization, but not until 2013.) For years, resilience efforts were seen as the “poor cousin” of the richer, meatier work of carbon reduction.

Fortunately, things have changed. Today climate action takes two distinct priorities—curbing greenhouse gases to fend off worst-case consequences and boosting community resilience to cope with the impacts already mounting. Or to put it another way, climate action now seeks to *avoid* the harm we can’t *manage* and to *manage* the harm we can’t *avoid*.

As it turns out, preparing for climate stress not only makes moral sense (some people are getting slammed *now*), but economic sense too. Preventing climate-based damage is almost always a bargain. Studies, for instance, show that every dollar spent on complying with a better building code saves four dollars of future loss. Grants that help homeowners improve storm resilience pay for themselves six times over.

As the examples of building codes and residential grants suggest, the local vision is key. There is no one better than Professor Nolon to develop this theme. He has pioneered many advances in local environmental law. Professor Nolon, it can be said, practically invented the field. Since the 1990s he has identified the ways local governments influence environmental protection, how they have obtained the power to do it, and followed that with theories of how local players can coordinate with one another and collaborate with large scales of power. Integrating those ideas into a book focused on the climate crisis is a crowning achievement.

Though comprehensive, this book meets readers where they are, laying out the basics of local government law and land use, then pivoting to the questions at the heart of climate action: How do we reach push-through politics and get people to care more? How do we make plans that provide stability, but that are flexible enough to handle surprises? How do we involve and address disadvantaged communities that already bear the brunt of environmental risk?

Some innovations addressed are technological, but the meat of this book involves governance and social cooperation—what experts in the United States and abroad consistently say is most lacking in addressing the effects of climate breakdown. Professor Nolon reminds us that in addition to making good personal choices like avoiding flood plains or installing a green roof, we all have a duty to make sure our governments and business leaders are up to the task. That means getting involved in local decisionmaking, voting, advocating for smart policies, and discussing climate resilience with colleagues, family, and friends.

The takeaway here is that grappling with the climate is not a fad, like *sous-vide* cooking or axe throwing. It is the *new normal*. People will be reading and talking about global warming and climate bubbles for decades to come. This book is meant to start readers on that journey, whether they are new to the issue, already familiar, or have some professional stake in it. Remember, throwing up your hands in despair is not an option when there is action to be taken. The opposite of despair is courage.

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Preface:

Choosing to Succeed

By sheer happenstance, I became a land use law professor. Pace, a highly ranked environmental law school, needed a real estate professor who could also teach land use law. All my experience involved representing clients at the local level. They were real estate clients who needed land use permits to develop their properties, or neighbors who opposed the issuance of such permits, or the municipalities themselves who needed counsel to ensure they followed legislated procedures and did not violate constitutionally protected property rights. I experienced land use law as it concerned property owners' rights and local governments' authority to limit those rights. The focus of my engagement was local law.

My environmental law colleagues, of course, taught federal environmental law, including how states implement standards contained in federal regulations. They were concerned about the use of state and federal lands and how point source pollution is controlled at the local level by state permitting systems. Local law was outside the circumference of what they taught. Environmental law, at the outset, was outside mine as well.

Gradually, things changed. My environmentally sensitive land use students found that local governments were adopting local laws to protect environmental values. Urban sprawl precipitated great interest in open space protection to maintain community character and property values. Soon, local laws became focused on the ecosystems that open space harbored: habitats; wetlands; and locally threatened species. Watershed and source water protection laws began to proliferate as local stakeholders learned that federal law was not seriously engaged in stemming nonpoint source pollution or protecting groundwater. My land use students helped me write articles and books about "local environmental law."

Around 1990, my students and I found that zoning and other land use regulations moved toward sustainability as they embraced green construction standards, transit-oriented development, the transfer of development rights, and renewable energy. We responded by writing about "local sustainable development law." Over the past decade, we learned that land use planning and regulation could be an instrument for managing climate change, both by promoting resilience and mitigating carbon emissions through the

proper design and construction of human settlements. We called this “low-carbon land use law” and wrote about this emerging framework of local laws. As this book goes to press, city officials and their professional advisors are exploring how zoning, building codes, and municipal budgets can create safe buildings and densities to stem the flight of urban dwellers to the suburbs: a response to the coronavirus—COVID-19. Failing in this task means that the ability of cities and urban villages to mitigate climate change will be greatly diminished.

This personal journey is the story told by this book. It starts with a shocking look at the escalating economic costs of untethered climate change, focusing on damage at the local level where municipal officials are the first to respond and where people and property are the most vulnerable. We call these “climate change bubbles” and show that when combined, they dwarf the housing bubble of 2008. The book then backtracks more than a century and explores the evolution of land use law from a system focused on civil engineering, traffic management, home construction, and the ridged separation of land uses to one that became nimble and flexible enough to meet the changing needs of society, to protect ecosystems, promote sustainability, and mitigate climate change.

The story continues with an exploration of the limitations that federal takings jurisprudence places on local power to retreat from sea-level rise, storm surges, and constant flooding. It then looks at side-stepping these limitations through local, nonregulatory strategies that can sharpen investor due diligence and discourage investments in these dangerous zones. Next, the need for governmental cooperation along the legal system’s vertical axis is illustrated by the wise integration of local comprehensive planning into state and federal hazard mitigation planning to anticipate, mitigate, and recover from the extreme natural disasters. Then, the fragmented state of the federal and state water law system is disclosed along with grass-roots driven actions that can integrate and leverage local, state, and federal resources. The book ends with a reflection on how municipalities can hone the local land use system’s tools and techniques, leveraged by state and federal assistance, to create safer buildings and places, including low-income neighborhoods, where a public health emergency has existed for decades.

This book is dedicated to my environmental colleagues at Pace and partner law schools, and, especially, to my students. The circumferences of what

we professors teach have truly begun to overlap and all of us are buoyed by the optimism and curiosity of our students.

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