PROTECTING THE ENVIRONMENT THROUGH LAND USE LAW: STANDING GROUND

by
John R. Nolon

Design Commentary by Robert N. Lane, RA

ENVIRONMENTAL LAW INSTITUTE
Washington, D.C.
# Contents

About the Author ............................................................................................................ xv

Author’s Preface and Acknowledgements ................................................................. xvii

Planning Forward ............................................................................................................ xxi

Legal Foreword .............................................................................................................. xxv

Chapter 1: The Long Arch of Local Environmental Law ....................... 1

I. The Ancients Stole All Our Good Ideas ......................................................... 1

A. Antecedents From Before the Common Era ............................................... 1

B. Early U.S. Efforts to Balance Conservation and Development ......................... 2

C. Setting the Stage for a New Legal Regime ....................................................... 5

II. Combining Land Use and Environmental Values .................................... 6

A. The First Fifty Years—Conservation Light ................................................. 6

B. Early Case Studies: Florida, Colorado, California, and New York .................... 7

C. Abiding Discontent With the Reigning Land Use System ......................... 9

III. The Advent of Local Environmental Law ............................................. 10

IV. Current Trends in a Changing Society .................................................. 13

A. Demographic Trends ............................................................................... 13

B. Projected Growth and Development ....................................................... 13

C. The Ultimate Perturbation—Climate Change ............................................ 14

V. Conclusion: Local Environmental Law in America ........................... 15

A. Chapter-by-Chapter: The Story of U.S. Land Use Law and the Environment ........ 15

B. How to Use the Law for Positive Change ........................................... 19
Chapter 2: Protecting the Environment Through Land Use Law:
Standing Ground ................................................................. 23

I. Overview of Land Use Regulation and Environmental Law................................................................. 23
   A. The Original Blueprint ........................................... 23
   B. Common Law Origins and the Colonial Period ..... 24
   C. The Formation of the Federal Republic ............ 26
   D. The Modern Era of Zoning ................................... 29

II. Exploring Municipal Authority to Control Private Land Use and Its Limitations ............................ 33
   A. Interpreting Local Authority ................................. 33
   B. State and Federal Guidance for Localities .......... 35
   C. State and Federal Preemption of Local Control ..... 36

III. Shared Responsibility for Protecting the Environment ................................................................. 37
   A. Overlapping Regulations ..................................... 37
   B. Strategies for Integration ................................... 38

IV. Attempts to Collaborate: Stormwater Management and the Total Maximum Daily Load Programs .......... 41
   A. Stormwater Management ................................... 41
   B. Total Maximum Daily Loads (TMDL) ................. 44

V. Hydraulic Fracturing: Fragmenting the Federal System ............................................................... 47
   A. Who Should Decide? ........................................... 47
   B. Federal Regulation of Environmental Pollution Caused by Hydraulic Fracturing ....................... 49
   C. State Regulation of Drilling Operations .............. 50
   D. Local Regulation of Land Use Impacts ............... 52
   E. Cooperative Governance ................................... 54

V. Integrating Governmental Influences ............................................................... 56

Chapter 3: An Environmental Understanding of the Local Land Use System .................................... 61

I. Planning, Zoning, and Land Development Basics ............................................................... 61
   A. The Basics of Land Use Planning ......................... 61
   B. The Rapid Rise of Zoning ................................... 62
C. Land Development Regulations and Plan Consistency ..................................................... 63

II. Land Use Plans and the Environment ................................................................. 63
   A. The Comprehensive Plan .................................................................................. 63
   B. Development of the Plan .................................................................................. 64
   C. Content of the Plan ............................................................................................ 65
   D. Environmental Benefits of Plan Consistency ................................................. 66
   E. Periodic Review .................................................................................................. 67
   F. Area Specific Plans ............................................................................................ 67
   G. Intermunicipal, Regional, and Interstate Planning ........................................... 68

III. Zoning and the Environment .............................................................................. 69
   A. Definition and Legal Authority ......................................................................... 69
   B. Examples of Local Zoning That Protects the Environment .................................. 72
   C. Zoning Amendments ......................................................................................... 74

IV. Land Development Regulations ........................................................................... 76
   A. Site Plan Regulations .......................................................................................... 76
   B. Subdivision Regulations ..................................................................................... 79
   C. Cluster Development and Conservation Subdivisions ......................................... 81

V. The Review and Approval of Land Development Proposals .................................. 84
   A. Local Land Use Boards ...................................................................................... 84
   B. Approving Projects to Protect the Environment ................................................ 84

VI. Balancing Conservation and Development ........................................................... 86
   A. Area Designation and Growth Management .................................................... 86
   B. Balance Over Time—Phasing Public Facilities .................................................. 89
   C. Environmental Impact Review .......................................................................... 91
   D. Incentive Zoning ................................................................................................. 91
   E. Overlay Zoning .................................................................................................... 92
   F. Planned Unit Development Zoning ..................................................................... 94
   G. Transfer of Development Rights ........................................................................ 96
   H. Sustainable Neighborhood Development ......................................................... 98
VII. The Sustainable Development Law Movement: Reacting to Climate Change
A. New Environmental Challenges
B. Opportunity for Sustainable Development

Chapter 4: Innovations in Local Environmental Law
I. Local Environmental and Land Use Law
II. Protecting Natural Resources Through Local Environmental Law
A. Purposes
B. Watershed Protection and Management
C. Stormwater Management
D. Wetlands Protection
E. Floodplains
F. Erosion and Sediment Control
G. Fish and Wildlife Habitat
H. Ridgeline Protection
I. Scenic Resources
J. Steep Slope Protection
K. Timber Harvesting Regulation
L. Tree Preservation

III. A Holistic Approach: The Environmental Protection Overlay District
A. Review of Overlay Zoning
B. A Model Environmental Protection Overlay District
C. Purpose and Objectives
D. Conservation Area Management

IV. Creating a Local Environmental Law Program
A. Form a Citizen Task Force
B. Conduct an Open Space Inventory
C. Create a Greenprint
D. Include the Greenprint in the Comprehensive Plan
Table of Contents

E. Amend Zoning................................................................. 164
F. Enact Project Review Standards................................. 165
G. Enforcement ................................................................ 165
H. Work with Landowners and Acquire Most
   Sensitive Parcels............................................................... 166
I. Cooperate With Adjacent Municipalities..................... 167
J. Leverage State and Federal Resources....................... 167

V. Extending the Reach of Environmental Law.............. 168

Chapter 5: Open Space Preservation and Biological
Sequestration .................................................................... 175

I. Land Use Strategies That Preserve Open Space............ 175
   A. Righting the Loss of Open Space......................... 175
   B. Open Space and Its Functions.............................. 175
   C. The Primacy of Local Power............................... 176
   D. Local Strategies ...................................................... 177

II. Local Open Space Preservation Techniques............... 178
   A. Zoning and Planning............................................... 178
   B. Better Site Planning.............................................. 182
   C. Clustering Development........................................ 184
   D. Low Impact Conservation Subdivisions.................. 186
   E. Supplemental Regulations...................................... 188
   F. Density Bonuses....................................................... 188
   G. Transfer of Development Rights............................ 189
   H. Timber-Harvesting Ordinances............................. 190
   I. Rearranging Development on Multiple Parcels...... 192

III. The Strategic Acquisition of Open Lands............... 192
   A. State and Local Authority to Acquire Land ............ 192
   B. State Financing of Open Space Acquisition ............ 196
   C. Local Financing Sources........................................ 198
   D. Land Acquisition Techniques ............................... 199
IV. Recalibrating Open Space Law to Manage Climate Change

A. Bringing Open Space Law to Scale: Biological Sequestration

B. The Gathering Consensus Regarding Climate Change Management

C. The Importance of Biological Sequestration to Mitigate Climate Change

D. Using Open Space Law to Accomplish Sequestration

E. Toward a National Strategy for Biological Sequestration

Chapter 6: Climate Adaptation and Disaster Mitigation: Land Use Strategies

I. Climate Change, Adaptation, and Disasters

A. Inundation, Flooding, and Fiercer Storms

B. Policy Options

C. Local Role: First Affected and First to Respond

II. Federal Actions: Policy, Funding, and Technical Assistance

A. Supportive Role of the Federal Government

B. Disaster Mitigation Act of 2000

C. Coastal Zone Management Act of 1972

III. State Actions: Plenary Power and Coordination

A. Intermediary Between Federal and Local Governments

B. Types of State Actions

C. Florida: A Case Study in Direct State Action—Beach Renourishment

IV. Local Initiatives

A. General Strategies

B. Case Studies
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>V. Dealing With Judicial Decisions</td>
<td>249</td>
</tr>
<tr>
<td>A. Ambiguity in Supreme Court Jurisprudence</td>
<td>249</td>
</tr>
<tr>
<td>B. Antidotes for the Legacy of Lucas</td>
<td>250</td>
</tr>
<tr>
<td>C. Changes in the Regulatory Environment</td>
<td>253</td>
</tr>
<tr>
<td>VI. Societies Choosing to Succeed</td>
<td>254</td>
</tr>
<tr>
<td>Chapter 7: Enhancing the Urban Environment Through Green Infrastructure</td>
<td>261</td>
</tr>
<tr>
<td>I. The Advent of Green Infrastructure</td>
<td>261</td>
</tr>
<tr>
<td>A. Definition</td>
<td>261</td>
</tr>
<tr>
<td>B. Benefits and Purpose</td>
<td>263</td>
</tr>
<tr>
<td>C. The Emergence of a New Urban Planning Initiative</td>
<td>264</td>
</tr>
<tr>
<td>II. Initiatives That Emphasize Green Infrastructure</td>
<td>265</td>
</tr>
<tr>
<td>A. Low Impact Development</td>
<td>265</td>
</tr>
<tr>
<td>B. Sustainable Sites Initiative (SITES™)</td>
<td>268</td>
</tr>
<tr>
<td>C. LEED for Neighborhood Development</td>
<td>273</td>
</tr>
<tr>
<td>D. SmartCode</td>
<td>276</td>
</tr>
<tr>
<td>E. Urban Agriculture</td>
<td>277</td>
</tr>
<tr>
<td>III. Additional Techniques That Advance Green Infrastructure</td>
<td>277</td>
</tr>
<tr>
<td>A. Increasing Tree Canopies</td>
<td>278</td>
</tr>
<tr>
<td>B. Green Roofs and Planters</td>
<td>280</td>
</tr>
<tr>
<td>C. Xeriscaping Requirements</td>
<td>282</td>
</tr>
<tr>
<td>D. Green Streets</td>
<td>283</td>
</tr>
<tr>
<td>E. Rainwater Harvesting and On-site Retention</td>
<td>284</td>
</tr>
<tr>
<td>F. Green Infrastructure Maintenance: Ensuring Continued Compliance</td>
<td>286</td>
</tr>
<tr>
<td>IV. A Municipal Case Study: Portland, Oregon</td>
<td>291</td>
</tr>
<tr>
<td>V. Grassroots Strategy</td>
<td>292</td>
</tr>
<tr>
<td>A. Citizen Engagement</td>
<td>292</td>
</tr>
<tr>
<td>B. The Natural Resource Inventory</td>
<td>293</td>
</tr>
<tr>
<td>C. Green Infrastructure Planning in a Dense Urban Community</td>
<td>294</td>
</tr>
<tr>
<td>Appendix: Further Resources</td>
<td>295</td>
</tr>
</tbody>
</table>
Chapter 8: Urban Agriculture

I. A Truly Local Movement: Urban Agriculture and Land Use Law

A. Definition
B. Trends

II. Benefits of Urban Agriculture

A. Environmental
B. Health
C. Economic

III. Concerns Raised by Urban Agriculture

IV. Land Use Barriers to Urban Agriculture

A. District or Zone Limitations
B. Lot Sizes and Setbacks
C. Number and Licensing of Animals
D. Restrictions on Sale of Products From Urban Farms

V. Zoning Changes That Legalize Agriculture Uses

A. Seattle, Washington
B. Pittsburgh, Pennsylvania
C. Philadelphia, Pennsylvania
D. Jersey City, New Jersey
E. Portland, Oregon
F. New York, New York

VI. Recommendations for Further Cultivation

A. Adopt a Policy Statement or Municipal Resolution Supporting Urban Agriculture
B. Establish an Urban Agriculture Task Force
C. Amend the Zoning Ordinance and Related Regulations
D. Other Municipal Efforts to Promote Urban Agriculture

VII. Facilitating the Movement Through Land Use Law Reform
Appendix: City and County of San Francisco, California: Urban Agriculture ................................................................. 320

Chapter 9: Balancing Conservation and Development Through Environmental Impact Review ........................................ 327
I. Role of Environmental Impact Review: NEPA and Its Progeny ........................................................................ 327
   A. The National Environmental Policy (NEPA) ....... 327
II. State Environment Policy Acts and Their Effects on Local Governments ................................................................. 328
   A. Overview of State Environmental Policy Acts ...... 328
   B. The California Environmental Quality Act ....... 328
   C. New York—The State Environmental Quality Review Act ................................................................. 335
   D. The Washington State Environmental Policy Act .... 342
III. Beyond SEPAs: Implied Authority of Local Governments to Conduct Environmental Reviews .... 346
   A. Implied vs. Express Powers ........................................ 346
   B. Authority to Enact Land Use Regulations ............ 347
   C. Authority to Adopt Local Environmental Impact Review .................................................................. 348
   D. Local Illustrations ................................................ 350
IV. Advanced Environmental Impact Review Techniques .... 355
   A. Master Impact Reviews, Program EIRs, and Generic Environmental Impact Statements ............. 355
   B. Cumulative Impact Analysis (CIA) ......................... 356
   C. Critical Environmental Areas ................................ 358
   D. Mitigation Conditions ............................................. 360
   E. Avoiding Unconstitutional Conditions Using EIR Techniques ............................................................ 362
V. Integrating Environmental Impact Review With Local Planning ................................................................. 364
   A. Potential Duplication and Inefficiency in Environmental Review ............................................................ 364
B. Methods of Integration ........................................ 364

VI. Using Environmental Impact Review to Balance Conservation and Development ........................................ 367

Appendix: Streamlining the Environmental Impact Review of Redevelopment Projects ........................................ 368

Chapter 10: Environmental Dispute Resolution and Land Use Decisionmaking ........................................ 377

I. Land Use Decisions and Negotiations: Inherent Conflicts and Alternative Processes ........................................ 377
   A. Achieving Balance Through Conflict Resolution .. 377
   B. Land Use Decisions As Negotiations .................. 378
   C. Using Dispute Resolution Early to Minimize Conflict ................................................................. 379
   D. Understanding Mediation .................................. 380
   E. Opportunities to Use Dispute Resolution in Land Use Decisionmaking ........................................ 381
   F. Community Leaders As Facilitators .................... 383

II. History and Legal Authority: Mediation and Land Use Conflicts ....................................................... 383
   A. The History of Mediation .................................. 383
   B. The Evolution of Mediation in Land Use Resolution ................................................................. 384
   C. Statutorily Authorized Mediation ......................... 386
   D. Mediated Settlements Achieved by Stakeholders in the Absence of Statutory Authorization ................ 387

III. The Theory and Techniques of EDR ........................ 391
   A. Interest-Based Negotiation ................................ 391
   B. The Mutual Gains Concept: Interests Versus Positions ................................................................. 393
   C. Reasons to Use Consensus-Building Techniques ... 394
   D. Common Objections to Consensus-Building Techniques and Responses ........................................ 395

IV. How to Build Consensus ....................................... 399
   Step 1: Identify the Key Stakeholders ..................... 399
Step 2: Assess Feasibility of a Consensus-Building Process ................................................................. 400
Step 3: Prepare for the First Meeting ......................... 400
Step 4: Convene Meeting .............................................. 401
Step 5: Conduct of Meetings ......................................... 402
Step 6: Meeting Summary ........................................... 402
Step 7: Implementation ............................................... 402
V. Adopting a State Law Supporting Land Use Mediation ................................................................. 403
VI. Supplementing the Land Use Decisionmaking Process ..................................................................... 404
Appendix: Model Local Land Use Mediation Law ............. 405
Index ................................................................................................................................. 411
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.