

Local Land Use Under Siege: Choosing to Succeed

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From Well-Grounded to Higher Ground: Using Climate Resilient Development to Address
Modern Crises
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Introduction: From Well-Grounded to Higher Ground

Land use law, established through over a century of case law, local government action, and federal-level acts, was fairly well-grounded when the Land Use Law Center was created in 1993. Local governments clearly and thoroughly acted as the designers of human settlements and the arbiters of economic development and natural resource protection. When Professor John R. Nolon began his book series on land use law, he said it was *Well Grounded*, steeped in decades of established norms and practices.² Then, a few years later, he highlighted the rise in local authority to promote natural resource protection and effective development as *New Ground* and *Open Ground*, an extension of the authority discussed in *Well Grounded*.³ He then reviewed local authority for disaster mitigation in *Losing Ground*, a first glimpse at the role local governments could play in combating climate change.⁴ Finally, in *Standing Ground*, he reinforced this role to prove that local authorities can use their powers to address the coming crises of climate change and its related threats.⁵

That well-grounded foundation of yesterday has been shaken, however, by a stubborn public health pandemic, a housing crisis threatening local control, serious endemic equity disparities, and the daily evidence of worsening climate disasters. These, we called the Four Pandemics – burgeoning crises that are changing the way we deal with local problems. Where historically, land use issues have fallen solely within the land use realm – using local environmental law to solve the problems associated with zoning, and nothing else – today has proven more difficult. Lately, land use is intricately connected with these Four Pandemics and likely many more. What was previously a vacuum of local problems with local solutions is now a complex and confusing web of challenges for local governments to solve with their limited resources. They have shaken the foundation upon which local authority is built, creating the need for interdisciplinary solutions to these problems. These challenges are faced throughout the country and demonstrate the need to move to higher ground to respond.

In the seminal 1926 case *Euclid v. Ambler Realty Co.*, the Supreme Court of the United States officially granted local governments the power to zone, stating that separation of uses serves many public interests.⁶ Many cases in the century since have solidified this local power, allowing,

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² John R. Nolon, *Well Grounded: Shaping the Destiny of the Empire State*, PACE UNIV. SCH. L. (Dec. 16, 1998).

³ John R. Nolon, *New Ground: The Advent of Local Environmental Law*, ENV'T L. INST. (Mar. 2003); John R. Nolon, *Open Ground: Effective Local Strategies for Protecting Natural Resources*, ENV'T L. INST. (May 2003).

⁴ John R. Nolon & Daniel B. Rodriguez, *Losing Ground: A Nation on Edge*, ENV'T L. INST. (June 2007).

⁵ John R. Nolon, *Protecting the Local Environment Through Land Use Law: Standing Ground*, ENV'T L. INST. (Aug. 29, 2014).

⁶ *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926).

among others, floating zones, growth management, use of the police power, and more.⁷ We took the authority granted to local governments in *Euclid* and grew it with *Chrinko*, *Penn Central*, *Loretto*, and more.⁸ We clarified preemption concerns, detailed the types of restrictions that zoning may impose, and determined the uses of the police power to support zoning. The combination of these cases with the sprawl produced by the post-World War II baby boom and the 1956 Federal Highway Act has created a thorough, albeit complex, system of responding to local land use concerns.⁹ This is the well-grounded Euclidean system of yesterday.

In the latter portion of the twentieth century, however, Neo-Euclidean development has pushed us away from the traditional separation of uses and towards a more comprehensive land use system that is being used to address concerns beyond simple uses of land.¹⁰ Those bases of authority, though built upon sound law, no longer encompass the full scale of land use concerns. Where land use problems previously existed solely in response to zoning methods, they now encompass public health, poverty, racial discrimination, climate change, the COVID-19 pandemic, and more. Our previous actions, focused wholly on the land itself, are no longer sufficient in resolving the problems faced at the local level. A combination of movement away from Dillon's Rule and changes in development patterns has altered the focus of land use law in recent years. When congregated with the challenges of the Four Pandemics, this unique combination of stressors and solutions has brewed the perfect storm for moving to higher ground.

Climate resilient development, a recent theory developed by the Intergovernmental Panel on Climate Change, poses a solution to these growing threats.¹¹ It incorporates many wide-ranging strategies to create a system of solutions to these modern crises, coming together to establish a web of techniques that can be used to improve the state of much more than simply land use.

⁷ See *Rogers v. Tarrytown*, 96 N.E.2d 731 (N.Y. 1951) (permitting the use of floating zones in local land use planning); *Golden v. Planning Bd. of Ramapo*, 285 N.E.2d 291 (N.Y. 1972) (permitting land use control over growth management and stating, "only at the regional level can the pitfall of idiosyncratic municipal action be avoided"); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) (providing that the police power is the basis of authority for local governments' land use control).

⁸ See, e.g., *Chrinko v. South Brunswick Township Planning Bd.*, 187 A.2d 221 (N.J. Super. Ct. Law Div. 1963) (providing local governments with the ability to plan for cluster and open space zoning); See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (creating a balancing test for Fifth Amendment takings); See, e.g., *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419 (1982) (elaborating on the takings rule when a government action essentially destroyed the owner's right to exclude from their property).

⁹ See, e.g., Richard F. Weingroff, *Federal-Aid Highway Act of 1956: Creating the Interstate System*, 60 U.S. DEPT. TRANSP. FED. HIGHWAY ADMIN. (1996), <https://highways.dot.gov/public-roads/summer-1996/federal-aid-highway-act-1956-creating-interstate-system> (explaining the Federal Highway Act and its role in urban sprawl); See, e.g., #44 *Urban Sprawl*, HEAL THE PLANET, <https://healtheplanet.com/100-ways-to-heal-the-planet/urban-sprawl/> (last visited Nov. 9, 2022) (stating, "urban sprawl began with the baby boomer generation").

¹⁰ See, e.g., Tamar Gharibian, *Euclidean Zoning's Restrictive Nature & Land Use Controls that Can be Utilized to Combat its Shortfalls*, MPUP 60: LAND USE CONTROLS (2020), https://www.researchgate.net/publication/341219709_EUCLIDEAN_ZONING'S_RESTRICTIVE_NATURE_LAN_D_USE_CONTROLS_THAT_CAN_BE_UTILIZED_TO_COMBAT_ITS_SHORTFALLS (providing an explanation of Euclidean zoning techniques and analyzing the Neo-Euclidean solutions to them); See John R. Nolon, *Death of Dillon's Rule: Local Autonomy to Control Land Use* (Oct. 11, 2020), <https://ssrn.com/abstract=3709379> (explaining Dillon's rule and recent deviation by state legislatures in the face of climate change).

¹¹ *Climate Change 2022: Impacts, Adaptation and Vulnerability, Summary for Policymakers*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE WORKING GROUP II 1, 29 (2022), https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf.

Climate Resilient Development

On February 27, 2022, the Working Group II of the Intergovernmental Panel on Climate Change (“IPCC”) released its Sixth Assessment Report’s Summary for Policymakers, highlighting the “rapidly narrowing window of opportunity” available for us to address climate change.¹² It proposed Climate Resilient Development (“CRD”) as the principal strategy to combat these crises.¹³ According to the IPCC, CRD is “an approach that integrates adaptation measures and their enabling conditions with mitigation to advance sustainable development for all.”¹⁴ The report explains that *adaptation* is the adjustment to climate and its impacts to minimize harm and encourage benefits.¹⁵ *Mitigation* is an “anthropogenic intervention” towards reducing or storing greenhouse gases.¹⁶ *Sustainable development for all* encompasses equity concerns to promote the effective CRD for everyone rather than the select, affluent few.¹⁷ Recent research has expanded definition of CRD to encompass maladaptation, or actions that adapt to climate change in a manner not conducive towards the long-term success of the solution, and enabling conditions, or those key to “implementing, accelerating, and sustaining adaptation in human systems and ecosystems.”¹⁸

CRD is the single-most important strategy for mankind’s adaptation to and mitigation of climate change. It encompasses everything from equity in comprehensive plans to urban tree canopy. It works towards protecting biodiversity, promoting equity, encouraging effective land use, and more.¹⁹ In examining the many strategies found by Land Use Law Center students, a group of Land Use Scholars established a step-by-step process for evaluating the strengths and gaps of local land use provisions in the context of CRD, including strategies, resilience, and maladaptation objectives of the found strategies.²⁰

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 30.

¹⁵ Ethan Baer et al., *Local Solutions to the Global Crisis: A Guide to Climate-Resilient Development*, ENV’T L. INST. 1, 2 (Nov. 2022), <https://www.elr.info/sites/default/files/files-general/52.10883.pdf>.

¹⁶ *Id.*

¹⁷ *See generally id.*

¹⁸ *Id.*

¹⁹ *Id.* at 3.

²⁰ *Id.* at 4-6.

“Step 1: Strategy Objectives

Key Question 1: What are the stated objectives of this strategy?

Key Question 2: What are the implied objectives of this strategy?

Step 2: CRD Objectives to Be Achieved

Key Question: What CRD objectives does the strategy achieve?

- a. *Adaptation:* Does the strategy adjust to present and future climate effects?
- b. *Mitigation:* Does this strategy reduce or sequester GHG emissions?
- c. *Equity:* Does this strategy include measures that explicitly consider and benefit vulnerable groups that disproportionately bear the burden of climate change?

Step 3: Methods to Ensure Resilience

Key Question: What methods exist in the strategy to ensure resilience?

Step 4: Methods to Avoid Maladaptation

Key Question: What methods exist in the strategy to avoid maladaptation?

Step 5: Feasibility Analysis

Key Question 1: What are the enabling conditions that make this strategy feasible?

Key Question 2: Is this strategy transferable to similar municipalities?"

As exemplified by the diverse work of these students, CRD is a wide-ranging system of comprehensive land use strategies used to combat the effects of climate change. The state of land use law today encompasses techniques beyond the simple separation of uses, such as low-impact development, green buildings, eTOD, green affordable housing, and more, and effective land use decision-making must incorporate CRD in these strategies. To deal with the threats of the Four Pandemics and beyond, we must move to higher ground, and CRD is the path to do so.

Conclusion

The threat of climate change is putting greater pressure on states and local governments to work together and move to higher ground. The well-grounded stability of land use law has been chipped away by the multifaceted threats associated with the twenty-first century: population boom, habitat fragmentation, racial and social inequity, the COVID-19 pandemic, housing insecurity, climate change, and more have come together to create the perfect storm. With the perfect storm, however, comes the perfect opportunity to better the planet and its legal, environmental, and social systems.

While these crises are just that – *crises* – they pose valuable opportunities for solutions that extend beyond the face of these issues. CRD can be used not only to mitigate and adapt to climate change, but also to promote equitable distribution of environmental and social benefits, reduce habitat destruction and support ecosystem services, improve human health and wellness, involve the public in local decision-making, make cities and towns better places to live, and more.²¹ It opens the door to a wide range of appealing solutions that broaden the realm of land use law and encourage an interdisciplinary approach to the crises threatening the planet.

²¹ See Baer, et al., *supra* note 14.