

State and Local Jurisdiction: Local Land Use Solutions
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Historically, states have delegated their authority to regulate and mitigate the effects of land use to local governments. Along with that power, states give local governments the authority to tax land development and the responsibility use their tax revenues to pay the cost of municipal services. Those three powers are intertwined and create a state-wide system of law that permits and controls land development in the public interest, primarily through local lawmaking and administrative procedures.¹

States give local governments broad and comprehensive control of urban development, human settlements, and land use projects. Local governments adopt comprehensive land use plans, zoning laws, subdivision and site plan regulations, and other land use laws.² The judiciary's traditional view that state-delegated local authority is to be narrowly construed under the so-called Dillon's rule has been overruled in most states, with respect to local land use authority, and replaced with a broader interpretation.³ A recent trend of some state legislatures to preempt local authority has generally not touched on local power to protect natural resources.⁴

¹ John R. Nolon, *Historical Overview of the American Land Use System: A Diagnostic Approach to Evaluating Governmental Land Use Control*, 23 PACE ENVTL. L. REV. 821 (2006).

² *Id.*

³ With respect to delegated local land use control, many states courts have largely abandoned Dillon's Rule in favor of a broad interpretation of local power. See for example: North Carolina: "It is the policy of the General Assembly that the cities of this State should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect." *Homebuilders Ass'n v. City of Charlotte*, 442 S.E.2d 45, 49 (N.C. 1994); New York: "...the court recognizes that "[t]he power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities..." (N.Y. 1995); Delaware: "The permissive nature of the statute makes it clear that the state statute sets a floor and not a ceiling for the City to honor." *City of Lewes v. Nepa*, No. S17A-06-003, 2019 LEXIS 293, 3 (Del. 2019); Idaho: "In enacting the Local Planning Act of 1975, the legislature obviously intended to give local governing boards, such as the Kootenai County Commissioners, broad powers in the area of planning and zoning." *Worley Highway Dist. v. Kootenai County*, 663 P.2d 1135, 1137 (Idaho Ct. App. 1983); Pennsylvania: "Municipalities have broad authority to regulate land use in general and mineral extraction in particular." *Southdown, Inc. v. Jackson Twp. Zoning Hearing Bd.*, 809 A.2d 1059, 1065 (Pa. Commw. Ct. 2002); Texas: "The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities." *Barr v. City of Sinton*, 295 S.W.3d 287, 297 (Tex. 2009) In addition to these judicial interpretations, some state legislatures have explicitly repealed the applicability of Dillon's Rule via statute (See e.g. *Guidebook for Municipal Officials of Mayor/ Council Cities* at 5 (2015). https://static.ark.org/eeuploads/arml/MayorCouncil_Guidebook_2015_WEB.pdf.); some states have incorporated self-executing provisions related to home rule authority in their state constitutions. (See, Hon. John D. Russell & Aaron Bostrom, *Federalism, Dillon Rule, and Home Rule*, American City County Exchange – White Paper (Jan. 2016), at 6.).

⁴ Some states have adopted laws that preempt municipal ability to pass any regulation related to entire areas of policy. With the exception of local control over fracking in a few states, these areas do not include

The delegation of the power to control and tax local development explains why state legislatures have not vested their state agencies with land use control so as not to compete with or hinder this traditional local jurisdiction. It also demonstrates why the opportunity – or responsibility – rests with local governments to fill the significant gaps in federal and state authority to regulate water quality. .

State Police Power

The United States' dual system of federalism reserves to the states the powers that are not specifically delegated to the federal government by the Constitution.⁵ The Tenth Amendment acknowledges the Constitution's reservation of powers.⁶ The police power and other powers reserved to the states are not powers conferred upon the states, but ones that have always resided within their dominion.⁷ So, to the extent that the Commerce Clause limits federal power to control water pollution, that jurisdiction remains with the states under their sovereign police power.

Although difficulties in defining the police power have plagued both courts and scholars,⁸ the term has come to be understood as the power to protect the health, safety, and

those related to land use and natural resource protection. See, Richard C. Schragger, *Federalism, Metropolitanism, and the Problem of States*, 105 VA. L. REV. 1, p. 29. (2019).

⁵ “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. Amend. X. See also James Madison, *The Federalist* No. 39, at 186 (Terence Ball ed., 2003) (Federal authority “extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.”); James Madison, *Federalist* No. 45, 292-293 (C. Rossiter ed. 1961) (“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.... The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.”)

⁶ U.S. CONST. Amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”) See also Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 778 (2007) (“the [Tenth] Amendment functions as a principal constitutional basis of state police power.”) (citations omitted).

⁷ See Brian W. Ohm, *Some Modern Day Musings on the Police Power*, 47 URB. LAW. 625, 626 (2015) (“The police power is *not*, as often cited, a power that is ‘conferred ... by the Tenth Amendment, U.S. Const., upon the individual states.’ The Tenth Amendment did not confer anything on the states. Rather, in the United States, sovereignty resides with the people.”) (citations omitted) (emphasis in original). See also Nolon, *supra* note 148 at 825 (“The U.S. Constitution created a federal government that has the power to legislate only within the parameters of the specific powers delegated to it in the Constitution. Notably, the full police powers of the states were not delegated to the federal government.”).

⁸ Walter Wheeler Cook, *What is the Police Power?* 7 COLUM. L. REV. 322, 322 (1907) (“No phrase is more frequently used and at the same time less understood” than the police power.”); Collins Denny, Jr., *The Growth and Development of the Police Power of the State*, 20 MICH. L. REV. 173, 173 (1921) (“The police power of the state is one of the most difficult phases of our law to understand, and it is even more difficult to define it and to place it within any bounds.”); Legarre, *supra* note 153 at 747 (“The police power suffers from a surprising problem. Though it has been in constant use for many years and has proved important in the vocabulary of American constitutional law [t]he meaning and implications of the term are far from clear.”)

welfare of the public.⁹ Historically, the police power has been equated with the general governmental objective of securing the public welfare through regulatory means.¹⁰ The Supreme Court has held that the police power inherently lies within the authority of the states,¹¹ and it is extremely broad, in that it encompasses a host of factors under the general term “public welfare.”¹² State supreme courts have likewise broadly interpreted the police power.¹³ The extent of the police power, however, seems to resist delineation, for it depends on shifting social, economic, and political winds.¹⁴

Using their reserved police power, state legislatures could give the power to regulate land development and mitigate its adverse impacts on water quality to state agencies. Regarding water law, as an example, state legislation in most states, including New York, does not give state agencies authority to regulate land development that contribute to groundwater contamination and non-point source pollution. The New York model, perhaps more aggressive in creating and empowering water related state agencies than most states, demonstrates the statutory limits of state agencies to control the sources of water pollution and watershed degradation.¹⁵

⁹ Police Power, BLACK’S LAW DICTIONARY (Defining police power as “[t]he inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice.”)

¹⁰ 4 Blackstone’s Commentaries 162 (Police power is “the due regulation and domestic order of the kingdom, whereby the inhabitants of a State, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners, and to be decent, industrious and inoffensive in their respective stations.”); ERNST FREUND, THE POLICE POWER, PUBLIC POLICY, AND CONSTITUTIONAL RIGHTS 3 (1904) (“It is possible to evolve at least two main attributes or characteristics which differentiate the police power: it aims to directly secure and promote the public welfare, and it does so by restraint and compulsion.”)

¹¹ *Nebbia v. People of New York*, 291 U.S. 502, 524-25 (1934) (“[W]hat are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions.”).

¹² *Berman v. Parker*, 348 U.S. 26, 32-33 (1954):

Public safety, public health, morality, peace and quiet, law and order--these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it The concept of the public welfare is broad and inclusive The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

¹³ See e.g., *Wulfsohn v. Burden*, 150 N.E. 120, 122 (N.Y. 1925) (The [police] powers [are] not limited to regulations designed to promote public health, public morals, or public safety, or to the suppression of what is offensive, disorderly, or unsanitary, but extend to so dealing with conditions which exist as to bring out of them the greatest welfare of the people by promoting public convenience or general prosperity.”); *Spann v. City of Dallas*, 235 S.W. 513, 515 (Tex. 1921) (“[t]he police power is a grant of authority from the people to their governmental agents for the protection of the health, the safety, the comfort and the welfare of the public. In its nature it is broad and comprehensive.”); see also Ohm, *supra* note 154 at 632-35.

¹⁴ Freund, *supra* note 157 at 3 (It is “only by a detailed examination of statutes and decisions that the [police] power can fully understood and defined.” Such an examination will “reveal the police power not as a fixed quantity, but as the expression of social, economic and political conditions. As long as these conditions vary, the police power must continue to be elastic.”).

¹⁵ See ECL, Article 15, Title 15, which authorizes DEC to govern allocation of limited water sources among users. The State’s Water Resources Law, Title 11 of Article 15, ECL, authorizes the DEC to

The New York Department of Health (DoH), for example, has the statutory authority to regulate the operation and design of private and some public groundwater wells.¹⁶ This is done in partnership with EPA.¹⁷ Such wells must meet DoH established water quality standards, but failure to meet them simply defeats the well permit application; it does not give the DoH the authority to prevent water pollution through land use regulation or other means.

The DoH does prevent water pollution by establishing requirements for small residential Onsite Wastewater Treatment Systems (OWTS), also through a permitting system.¹⁸ OWTS facilities must be designed to meet DoH water quality standards. Its authority to manage this permitting function, however, does not give the state agency authority to limit, shape, or prevent land development on private property. It does not reach the issue of non-point source pollution.

State statutes in New York give the Department of Environmental Conservation (DEC) primary authority for comprehensive management of the state's water resources.¹⁹ DEC also collaborates with EPA to identify and list waterbodies that qualify as "impaired waters" under section 303(d) of the Clean Water Act. The Act encourages states to classify such waters and develop Total Maximum Daily Loads (TMDLs) of a large number of contaminants for them.²⁰ The DEC has developed an elaborate system for classifying waterbodies in the state by best uses, but the lack of enforcement and penalties for failing to meet TMDL standards renders this federal-state initiative relatively impotent concerning land use regulation and non-point source pollution prevention.²¹

undertake comprehensive planning for the protection, conservation, and beneficial utilization of the water resources of the state. Although seldom employed, Title 11 allows local governments to receive comprehensive planning assistance. Title 27 of Article 15 of the ECL in New York provides for the management and protection of certain wild, scenic, and recreational rivers which can affect the scope of local land use regulations. A little-used provision of State law, Article 11, section 1100 of the Public Health Law allows the DoH to issue watershed rules and regulations, which can unite upstream and downstream municipalities in collaborative efforts to limit contamination of downstream public water supplies.

¹⁶ N.Y. Pub. Health Law, Article 11.

¹⁷ Under the Safe Drinking Water Act, EPA must establish maximum levels for contamination to protect public health. 42 U.S.C. sections 330g-1. States may obtain primary responsibility enforcing these federal standards by adopting standards that are no less stringent than those of EPA. See Section 300g-2.

¹⁸ 10 NYCRR Appendix 75-A. See also 6 NYCRR Part 750 giving the Department of Environmental Conservation authority to create design standards for residential wastewater systems with flows of over 1,000 gpd and other private, commercial, and institutional systems.

¹⁹ The Water Resources Protection Act, Title 29, Article 15, ECL, in New York gives its DEC primary responsibility for comprehensive management of the state's water resources including establishing a permit system for private user water withdrawals from wells and surface waters.

²⁰ See *supra* notes 140-148 and accompanying text.

²¹ *Id.*