

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 Dillion'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

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 constitution

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 (t)-3(d43()-11(in)-3l7i/-3(d)-850l612 792 reW*

The New York Department of Health (DoH), for example, has the statutory authority to