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Peter S. Taub*

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LAND USE REFORM AND THE CLEAN AIR ACT AFTER *DOLAN*

PETER S. TAUB*

INTRODUCTION

Recently, in *Dolan v. City of Tigard*,¹ a divided Supreme Court sharply curtailed the land-use authority of state and local governments.² In *Dolan*, the Court announced a new standard to determine the constitutionality of land-use ordinances, and even more significantly, shifted the burden of proving that challenged regulations are justified from landowners to the government.³

Dolan will likely transform traditional interpretations of land-use statutes regulating the environment. Land-use regulations that have effectively controlled environmental problems for decades, such as those aimed at achieving and maintaining cleaner air, continue to be utilized to deal with pressing environmental issues. One major group of regulatory reforms, the 1990 Amendments to the Clean Air Act ("CAA"),⁴ require states to make significant progress toward reaching the national goal of making the air healthier to breathe.⁵

The CAA Amendments require states to take more aggressive measures to reduce the quantity of targeted pollutants emitted from stationary and mobile sources.⁶ One of the regulated pollutants, ozone, has received a great deal of public attention.⁷ In a 1987 report

* B.A. 1989, Brandeis University; J.D. 1992, Widener University School of Law; LL.M. Environmental Law 1995, Pace University School of Law.

1. 114 S. Ct. 2309 (1994) (Rehnquist, C.J., O'Connor, J., Scalia, J., Kennedy, J., Thomas, J., majority) (Stevens, J., Blackmun, J., Souter, J., Ginsburg, J., dissenting).

2. Linda Greenhouse, *High Court, in a 5-4 Split, Limits Public Power on Private Property*, N.Y. TIMES, June 25, 1994, at 1.

3. *Dolan*, 114 S. Ct. at 2318-19.

4. 42 U.S.C. §§ 7401-7642 (1990).

5. The purpose of the Clean Air Act ("CAA") is to protect the public health and welfare by improving the quality of the nation's air. Under the CAA, the Environmental Protection Agency ("EPA") is authorized to establish safe levels for different air pollutants that are believed to cause public health problems. These threshold pollutant levels are known as National Ambient Air Quality Standards ("NAAQS") and are to be implemented through state programs, or State Implementation Plans ("SIPs"), to control local sources of pollution. 42 U.S.C. § 7410 (1990). "State Implementation Plan" or "SIP" means documents prepared by the Department of Environmental Conservation, and submitted to the administrator for approval, which identify actions and programs undertaken by the state and its subdivisions to implement the Act." 1993 N.Y. Laws Ch. 608 at 3.

6. 42 U.S.C. §§ 7401-7642.

7. "Depending upon where it is found, ozone acts either as a beneficial compound, typically referred to as stratospheric ozone, which shields the earth from harmful ultraviolet radiation, or as a harmful compound, typically referred to as ground-level ozone, the primary component of smog." Sara R. Nichols, *A View From The Trenches*, 3 VILL. ENVTL. L.J. 323, 325 (1992) (citing 3 FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 13.03(4)(g)(i) (1992)); HALE & DORR & TRC ENVI-

entitled *Unfinished Business*,⁸ the EPA characterized ground-level ozone as an environmental problem that currently poses one of the greatest risks to human health and the environment.⁹ Ground-level ozone is formed when volatile organic compounds ("VOCs") and oxides of nitrogen ("NOx") combine in the presence of sunlight and heat.¹⁰ Motor vehicle emissions produce approximately thirty-five percent of this NOx and sixty percent of the VOCs responsible for ground-level ozone.¹¹ "Indeed, sixty percent of the total urban air pollution in most U.S. cities results from motor vehicle emissions."¹² Therefore, when automobile emissions are reduced, the concentration of ground-level ozone will correspondingly decline.

Achieving the National Ambient Air Quality Standards ("NAAQS") for ozone,¹³ however, has proven difficult for various regions of the country,¹⁴ including New York. Nevertheless, New York's State Implementation Plan ("SIP") expressly indicated that "[i]t is the intent of this SIP to continue expeditious progress to bring all areas of the State into attainment as well as maintain the air quality levels below the NAAQS for years to come."¹⁵ It is doubtful that the means intended to achieve this goal are likely to succeed. This Essay will suggest an alternative method for attaining the clean air standard for ozone in New York, and discuss the viability of such a plan in the wake of the *Dolan* decision.

This Essay will analyze in Part I, the New York SIP as it relates to ground-level ozone; in Part II, the likelihood that its program of control measures will accomplish compliance with the ozone NAAQS in

ENVIRONMENTAL CONSULTANTS, INC., THE CLEAN AIR ACT AMENDMENTS: STRATEGIES FOR THE 1990's 2 (1991).

8. Nichols, *supra* note 7, at 325 n.10 (citing RICHARD D. MORGENSTERN ET AL., EPA, UNFINISHED BUSINESS (1988)).

9. Some of the health problems associated with or aggravated by ozone are well-documented. "At certain concentration levels, ozone irritates the respiratory system and causes coughing, wheezing, chest tightness, and headaches; can aggravate asthma, bronchitis and emphysema." *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1181 (D.C. Cir. 1981) (holding that the primary and secondary NAAQS for ozone are supported by a rational basis on the record), *cert. denied*, 455 U.S. 1034 (1982).

10. *Id.*

11. Nichols, *supra* note 7, at 326.

12. *Id.*

13. The NAAQS for ozone is 0.12 ppm (235 us/m) averaged over one hour. See 40 C.F.R. § 50. This Essay will address ground-level ("tropospheric") ozone; stratospheric ozone depletion and the related "greenhouse" effect are addressed in Title VI of the CAA Amendments.

14. See generally *Stratospheric Ozone Depletion: Hearings Before The Subcommittee On Health and the Environment of the House Committee On Energy and Commerce*, 101st Cong., 2d Session (1990), noted in Nichols, *supra* note 7, at 324 n.4 (discussing CAA Amendments requiring EPA to take steps to protect stratospheric ozone layer from further depletion).

15. DIVISION OF AIR RESOURCES, NEW YORK STATE DEP'T OF ENVTL. CONSERVATION, NEW YORK STATE IMPLEMENTATION PLAN OZONE REVISIONS 36 (Proposed Revision Nov. 1992) [hereinafter NEW YORK SIP].

the New York City Metropolitan area; in Part III, whether a regional "phased growth" land-use alternative would improve the likelihood of realizing NAAQS achievement for ozone over a period of time, but once achieved would be maintained more easily and without resorting to stricter regulations and/or forced lifestyle changes on the general public; and finally in Part IV, the impact of *Dolan*¹⁶ on the ability of the New York Legislature to enact a regional comprehensive land-use plan.

I. THE CLEAN AIR ACT AMENDMENTS OF 1990 AND NEW YORK'S SIP

The New York Metropolitan Area is designated as a "severe nonattainment" area with respect to the NAAQS for ozone, and has been in nonattainment since the standard was first promulgated in 1973.¹⁷ As required by their SIPs, regions that are classified as "severe nonattainment" areas must take certain steps designed to achieve and maintain the NAAQS for ozone.¹⁸

Recognizing that many air pollution problems are caused by automobile emissions, the CAA Amendments include a menu of Transportation Control Measures ("TCMs") as part of its program to address regional air pollution problems which is designed to offset increasing emissions caused by the growth in vehicle miles traveled.¹⁹ When writing its SIP, a state may incorporate some of these TCMs to address the increase in miles driven by cars. New York has chosen several TCMs to ensure compliance with the ozone NAAQS, including the Employee Trip Reduction Plan²⁰ ("ETR") and an enhanced vehicle Inspection and Maintenance ("I/M") program.²¹ The New York SIP does not include any land-use measures among its TCMs.

16. *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

17. Classifications and attainment dates for NAAQS are found at 42 U.S.C. § 7511 (Supp. 1993). The CAA Amendments contain deadlines at which time states are to have achieved, or attained, the air quality for a particular pollutant. States that do not meet these deadlines are deemed to be in "nonattainment" status. Classifications for nonattainment areas, depending on their air quality, are: marginal, moderate, serious, severe, and extreme. NEW YORK SIP, *supra* note 15, at 4.

18. NEW YORK SIP, *supra* note 15, at 2.

19. 42 U.S.C. § 7511a.

20. N.Y. TRANSP. LAW § 14(31) (McKinney 1993). The ETR program recognizes that reducing the number of miles driven will lower the amount of ozone precursor in the air. The program requires employers with 100 or more employees to develop a plan to increase the average vehicle occupancy by 25%, either by carpooling or encouraging use of public transportation. Companies that fail to file a plan are subject to fines of up to \$500 per day.

21. N.Y. VEH. & TRAF. LAW §§ 301-306 (McKinney 1993). The enhanced I/M program requires biennial inspection of motor vehicles' air contaminant emission systems and devices to determine operating efficiency. It is designed to lower automobile emission of pollutants into the atmosphere and is expected that the program will make significant reductions in emissions of ozone precursors, hydrocarbons, and NOx. NEW YORK SIP, *supra* note 15, at 43.

The failure of New York to incorporate land-use planning into its SIP is significant for several reasons. If the issue of land-use planning is addressed today, the goal of cleaner air can be accomplished. Once the goal is achieved, it can be maintained without having to resort to draconian measures, such as allowing individuals to drive automobiles during commutes only on alternate days.

A regional comprehensive land use plan would go a long way toward reducing "urban sprawl," one of the main factors contributing to the increased number of vehicle miles traveled.

As individuals move to more rural areas to escape densely populated cities, multi-acre zoning ordinances create far reaching suburbs that mandate many more miles of highways for daily work commutes. Now situated far from any feasible mass transit system, residents add an increasing number of vehicles to these highways.²²

Actions aimed at land use would influence the growth patterns of local communities, lowering vehicle miles traveled while encouraging reliance on mass transit to meet the travel needs of the region.²³

If individuals do not have to drive to strip malls for their daily needs, VMTs will be reduced. "Automobiles spawned the urban sprawl and vast suburban residential and shopping mall development of the past four decades, making mass transit irrelevant for many Americans and a less-favored alternative for most of the rest."²⁴

Not surprisingly, the ETR program has not been well-received by the business community.²⁵ Although objections to the ETR program are important to consider, the most serious criticism may be its effect on the region's economy. "[I]f employees cannot choose the means of transportation they think is most convenient, it will further erode the competitive position of New York City as a place to do business."²⁶ Critics question the value of the ETR plan by arguing that because the ETR only affects trips to work, a comparatively small percentage of the number of trips made daily, its effect on the level of ozone in the ambient air is negligible.²⁷

22. Nichols, *supra* note 7, at 335 n.73.

23. MICHAEL REPLOGLÉ, ENVTL. DEFENSE FUND, TRANSPORTATION CONFORMITY AND DEMAND MANAGEMENT: VITAL STRATEGIES FOR CLEAN AIR ATTAINMENT 39 (1993).

24. Philip Weinberg, *Public Transportation and Clean Air: Natural Allies*, 21 ENVTL. L. 1527, 1530 (1991). "In recent decades, due to restrictive single-use Euclidian zoning, a large share of U.S. suburban residences and workplaces have been developed in large, homogeneous neighborhoods, beyond walking distance of convenience retail and services." REPLOGLÉ, *supra* note 23, at 72.

25. Matthew L. Wald, *Companies Resist Rules On Driving*, N.Y. TIMES, May 2, 1994, at B1.

26. *Id.*

27. REPLOGLÉ, *supra* note 23, at 53. For example, the California Clean Air Act's ambitious goal of a 1.5 worker-to-vehicle ratio in highly polluted areas that would amount to a 25% reduction in vehicular work trips, translates into less than a 5%

The success of any program is dependent upon the willingness of those charged with its implementation. Both the public and employers are not enthusiastic about the ETR, leading to a reluctance to put it into practice. Similarly, the enhanced I/M program has experienced its share of difficulties as states with air pollution problems commence its implementation.²⁸ The public protest to the I/M measure has put pressure on the Clinton Administration to delay the program, with some states calling for more freedom to devise other plans that would achieve cleaner air.²⁹ States have been placed in a precarious political position because they are required to meet all pollution reduction targets and face boycotts by their citizens in attempting to implement mandated CAA Amendment programs.

It will take years to measure whether the enhanced I/M and ETR programs will prove successful in reducing the amount of ozone in the air. Land-use reform would be a very useful mechanism in achieving cleaner air at lower political risk.

II. CLEAN AIR AND LAND-USE REFORM

Congress professes that federal legislation does not infringe upon the traditional authority of local communities to determine their own rate of growth and development.³⁰ The CAA expressly provides that “[n]othing in this chapter constitutes an infringement on the existing authority of counties and cities to plan or control land use, and nothing in this chapter provides or transfers authority over such land-use.”³¹

Despite this respect for local control of land-use planning decisions, it will be difficult to achieve the congressional goals for cleaning the environment if changes are not made in the development patterns at the local level. These changes can be implemented by amending the zoning enabling legislation. Indeed, the ozone problems faced by many states can be satisfactorily addressed only through the centralized exercise of land-use authority presently possessed by local communities. Land use has traditionally been the jurisdiction of local

reduction in total VOC weekday mobile source emissions considering both work and non-work travel.

28. Sam Howe Verhovek, *Texas Joins Parade of States Colliding With Clean Air Act*, N.Y. TIMES, Feb. 14, 1995, at A1 (describing the inspection and maintenance program, discussed *supra* note 21, which tests fuel and exhaust systems at different speeds, and the anger that it has generated among motorists. Cars that potentially fail inspection must be brought to another location for expensive repairs and then back to the inspection center for the inspection sticker).

29. *Id.* at A16.

30. 42 U.S.C. § 7431 (1990).

31. *Id.*

governments, which, after giving due consideration to regional needs, have been permitted to establish their own rates of growth.³²

As a result of the interaction between modern environmental law and local governments' land-use planning domain, "diverse changes in the role of local government emerged: local government received new regional responsibilities and new powers to shape its environment, subject to restrictions on its former ability to act completely independently."³³ To effectively deal with regional problems such as air pollution, New York must adopt a state-wide approach to land-use planning.

Alternate housing and development policies can have a potent effect on transportation demand and related air quality. As a TCM that is reasonably available to all communities, alternative land use, zoning, urban design, and growth management strategies should be evaluated in any nonattainment area for long-range planning.³⁴

Zoning regulations, as an exercise of land-use authority, have traditionally been a tool of environmental protection.³⁵ Although zoning is not usually thought of when considering the sources of governmental regulatory power over the environment, land-use planning can be effective in stabilizing and preventing pollution.³⁶

Before the advent of modern environmental law, zoning was employed for a variety of what are now classified as environmental objectives. Valid "environmental" zoning restrictions include: height restrictions on buildings, separation of noisy, dust-generating industry from residential neighborhoods, bans on microwave towers, and designating a riverbank as parkland.³⁷

The Tenth Amendment to the Constitution provides that those "powers not delegated to the United States . . . are reserved to the States respectively, or to the people."³⁸ The power of local governments to regulate land use is derived from the police power of the state, in the form of an enabling statute. In upholding a state's ability to regulate its affairs, the Supreme Court has defined the "police power" as the "acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens."³⁹

32. Frank Marcus, *Development Exactions: The Emerging Law of New York State*, C431 ALI-ABA 1725 (1989).

33. Daniel Reilly, *Transformation at Work: The Effect of Environmental Law on Land Use Control*, 24 REAL PROP. PROB. & TR. J. 33, 34 (1989).

34. REPLOGLE, *supra* note 23, at 72.

35. See *infra* notes 41-42 and accompanying text.

36. *Id.* To restrict the meaning of environmental law to only "pollution control" ignores its older, and equally-important other purpose, preservation and conservation. In these areas, local entities can attain environmental protection through careful land use by retaining their historic zoning powers. REPLOGLE, *supra* note 23, at 70-72.

37. REPLOGLE, *supra* note 23, at 70-72.

38. U.S. CONST. amend. X.

39. *Gibbons v. Ogden*, 22 U.S. 1, 208 (1824); BLACK'S LAW DICTIONARY 1156 (6th ed. 1990).

The state should be able to retain some of its authority over land use to deal with environmental problems that affect an entire region within the state, especially when the federal sanctions for not addressing air pollution directly affect highway funds for the entire state.

Currently, "[t]owns, cities and villages lack the power [absent enabling legislation] to enact and enforce zoning or other land-use regulations. The exercise of that power, to the extent that it is lawful, must be founded upon a legislative delegation to so proceed, and in the absence of such a grant will be held Ultra Vires and void."⁴⁰ In New York, the delegation of land-use powers to local governments is accomplished by section 261 of the Town Law.⁴¹ By amending this enabling legislation to provide for a regional land-use body that would authorize the approved rate of development in ozone nonattainment areas, New York would be taking a practical, progressive step toward solving its air pollution problems.

Thus far, the New York Legislature ("Legislature") has authorized town zoning boards to adopt zoning ordinances regulating and restricting, among other things, "the height, number of stories and size of buildings and other structures, the size of yards and other open spaces, [and] the [overall population] density."⁴² These laws were promulgated "[f]or the purpose of promoting the health, safety, morals, or the general welfare or the community."⁴³ Thus far, the Legislature has failed to devise regional land-use plans that would substantially aid local governments to deal with environmental pollution.

Generally, zoning ordinances have been ruled constitutional by the Supreme Court.⁴⁴ The New York Court of Appeals has also acknowledged a limited role that courts should play in coping with the environmental problems faced by the state.⁴⁵ In *Berenson v. Town of New Castle*,⁴⁶ the court noted,

[z]oning . . . is essentially a legislative act. Thus, it is quite anomalous that a court should be required to perform the tasks of a regional planner. To that end, we look to the Legislature to make appropriate changes in order to foster the development of programs designed to achieve sound regional planning.⁴⁷

40. *Golden v. Planning Bd. of Ramapo*, 285 N.E.2d 291, 296 (N.Y.), *cert. denied*, 409 U.S. 1003 (1972).

41. N.Y. TOWN LAW § 261 (McKinney 1987).

42. *Id.*

43. *Id.*

44. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (announcing the Court's ruling that zoning ordinances are constitutional unless they are clearly arbitrary and unreasonable and have no substantial relation to the public health, safety, morals, or general welfare).

45. *Berenson v. Town of New Castle*, 341 N.E.2d 236 (N.Y. 1975).

46. *Id.*

47. *Id.* at 243.

Despite the need for regional planning recognized by the Court of Appeals, there has been no movement by the Legislature in this direction since *Berenson* was decided twenty years ago, leaving a void for the courts and localities to make policy.⁴⁸ The CAA Amendments and *Dolan* provide a new impetus for the Legislature to craft a regional land-use plan.⁴⁹

III. REGIONAL PHASED GROWTH PLANS—A LAND USE ALTERNATIVE

In *Golden v. Planning Board of the Town of Ramapo*,⁵⁰ the New York Court of Appeals, frustrated by the lack of guidance from the Legislature in the area of state-wide planning, expressed its disapproval of exclusionary zoning techniques utilized by local communities that did not want to deal with the burdens associated with regional growth.⁵¹ The court permitted the Town of Ramapo ("Town") to implement an alternative plan, termed "phased growth."⁵² "Phased growth" is defined as allowing an area to develop at an orderly rate, making certain that an adequate infrastructure was in place to handle the increased population.⁵³

The court did not construe this plan as an impermissible moratorium on growth, but rather as a legitimate effort by the Town to cope with its share of the regional burden.⁵⁴ The court found that, "[t]he restrictions conform to the community's considered land use policies as expressed in its comprehensive plan and represent a bona fide effort to maximize population density consistent with orderly growth."⁵⁵ Although the zoning plan amendments would have prevented certain types of development for up to eighteen years, they were not considered a taking because certain development was still permitted, the public interest was satisfied by an ongoing planning requirement, and they conformed with the Town's overall growth plan.⁵⁶

48. Michael G. Sterthous, Comment, *Accommodating Growth and Development After Guilderland: Is the New York Legislature About to (Re)act on Impact Fees?*, 8 PACE ENVTL. L. REV. 175, 185 n.55 (1990).

49. As Professor Humbach has observed:

[t]raditional zoning serves the goals of consolidating like uses and separating incompatible uses, but zoning traditionally has not been employed to channel development away from certain areas altogether. To save the familiar countryside and the natural areas between developed centers, new building activity must be directed away from the open terrain: It must be steered into, or next to, those places where development exists already.

John A. Humbach, *Law And A New Land Ethic*, 74 MINN. L. REV. 339, 349 (1989).

50. 285 N.E.2d 291, 296 (N.Y.), cert. denied, 409 U.S. 1003 (1972).

51. *Id.* at 300-01.

52. *Id.* at 300.

53. *Id.* at 300-01.

54. *Id.* at 297.

55. *Id.* at 302.

56. *Id.* at 303-05; cf. *Westwood Forest Estates, Inc. v. Village of South Nyack*, 244 N.E.2d 700, 703 (N.Y. 1969) (N.Y. Court of Appeals approved a temporary morato-

The New York Court of Appeals decision in *Golden* is consistent with the Supreme Court's decision in *Dolan*. The New York Court of Appeals approved a community's "phased growth" land-use plan because its restrictions, limiting the rate of growth until adequate infrastructure was in place to handle the increased population, conformed to a comprehensive plan for the Town. The Town's land-use law did not burden one landowner more than any other, nor did it require the property owner to take any action, such as dedicating a portion of the property to the Town as a condition of building permit approval, as was the case in *Dolan*.⁵⁷ Furthermore, the burdens associated with improving New York's air quality are regional and consequently the costs should be spread among the population.

More comprehensive land use strategies to stem further uncontrolled suburban sprawl and promote more clustered development patterns and urban revitalization will be essential in the longer run. While land use strategies will yield only modest short-term benefits, it is essential to undertake selected measures related to land use now to begin the process of channeling future growth in more economically efficient and environmentally sustainable patterns.⁵⁸

In *Albany Area Builders Association v. Town of Clifton Park*,⁵⁹ the Appellate Division of New York approved a local zoning ordinance that required "phased growth" for an area of Clifton Park suffering from severe traffic congestion. To reduce the risk of injury and death caused by increased traffic congestion, the local law allowed for only twenty percent of the homes within a particular development to be given building permits in any given year.⁶⁰ The law was only to be in effect for a period of five years, or until an exit to the nearby highway could be improved to accommodate the increased traffic that more homes in the area would generate.⁶¹

Buttressed by the argument that it was a compromise between a suspension of growth and uncontrolled growth, the court found the law constitutional because the law's purpose, "the alleviation of traffic congestion [therefore] is related to public health, safety and welfare . . . the law [was] rationally related to a legitimate government interest."⁶² Thus, the *Albany Area Builders* court approved restriction on further development in the area that would contribute to increased traffic congestion.⁶³

rium on development so that inadequate sewage treatment facilities could be rebuilt to prevent pollution of the Hudson River).

57. See *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2321-22 (1994).

58. REPLOGLÉ, *supra* note 23, at 56.

59. 172 A.D.2d 54 (N.Y. App. Div. 1991).

60. See *id.*

61. See *id.* at 55.

62. *Id.* at 56.

63. *Id.*

Would it be permissible for the state legislature to suspend certain growth that will contribute to ozone violations of the CAA Amendments, or at least limit the degree of growth in certain areas which can be shown to contribute to the continuing violation of the CAA's ozone provisions? Would this limited development moratorium be permissible for a period of ten years or even eighteen years? New York's courts do not approve of moratoriums on growth because they are viewed as an exclusionary device used to deny regional responsibilities, but the courts have looked favorably upon "phased growth" laws.⁶⁴

"Phased growth" laws that can be supported by proof that they (1) are not for indefinite periods of time, (2) are related to valid public health, safety, and welfare concerns, and (3) are within the context of a broader regional zoning plan, would likely be approved.⁶⁵ As long as landowners were permitted to use and develop their land, a "phased growth" law for a period of ten to twenty years based on the need to protect the public from the serious health consequences of high concentration ground-level ozone as part of a regional growth and development plan would likely be deemed a legitimate exercise of the state's police power. Such a law would be an effective land-use mechanism in the severe nonattainment areas for ozone in New York City and surrounding counties.

The need for a regional growth plan has intensified because New York must now also comply with the requirements of the Intermodal Surface Transportation and Efficiency Act ("ISTEA"),⁶⁶ which forces the state to ensure that federal highway funds are used in a manner that is consistent with New York's SIP.⁶⁷

Prior transportation legislation traditionally and overwhelmingly favored highway construction. The ISTEA radically alters the federal government's approach to transportation funding. The ISTEA allows nonattainment areas flexibility for the first time with respect to how they spend federal transportation funds. No longer can these funds be used to build highway projects which would result in increased traffic resulting in failure to meet NAAQS levels. Funds that otherwise would have been used to expand highway capacity now can be used for public transit projects.⁶⁸

This new transportation policy will have several impacts. It will add a planning step to the process of building highways, and will also have

64. See *Golden v. Planning Bd. of Ramapo*, 285 N.E.2d 291 (N.Y.), *cert. denied*, 409 U.S. 1003 (1972).

65. See *supra* cases cited in notes 56 and 59.

66. Intermodal Surface Transportation and Efficiency Act of December 18, 1991, Pub. L. No. 102-240, 105 Stat. 2006 (codified as amended in scattered sections of 5 U.S.C.; 15 U.S.C.; 16 U.S.C.; 23 U.S.C.; 26 U.S.C.; 33 U.S.C.; 42 U.S.C.; 45 U.S.C.; and 49 U.S.C.).

67. 23 U.S.C. § 134(g)(3); 23 U.S.C. § 135(b).

68. Nichols, *supra* note 7, at 334; 23 U.S.C. § 149(b).

the effect of limiting the capacity of highways by restricting the number of automobile miles traveled on those same roads.

IV. LAND USE REFORM AND *DOLAN*

In *Dolan*, the petitioner wanted to expand the size of her retail store located in Tigard's commercial district, and applied for a building permit from the City Planning Commission.⁶⁹ Tigard's comprehensive land-use plan, codified as the Community Development Code ("CDC"), required property owners to set aside fifteen percent of their land for open space and landscaping.⁷⁰ After a transportation study was completed, the City granted Dolan the building permit subject to the conditions that she "dedicate the portion of her property lying within the 100-year floodplain for improvement of a storm drainage system along Fanno Creek and that she dedicate an additional 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway."⁷¹ Cumulatively, the required property dedication encompassed roughly ten percent of Dolan's property.⁷²

Pursuant to Dolan's permit application, the City performed a transportation study to estimate the increased traffic that the expanded store would generate.⁷³ The study, however, was found by the Court to be too indefinite.⁷⁴ The majority reasoned that the link between the environmental consequences of the expanded store and the necessity of the bicycle/pedestrian pathway was too tenuous.⁷⁵ The Court indicated that "the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement."⁷⁶

Although the Court reaffirmed the power of state and local governments to engage in environmental preservation through land-use planning, it found that the permit condition requiring the dedication of an additional ten percent of land violated the Fifth Amendment's Takings Clause.⁷⁷ The Court noted, however, that the prevention of flooding, the reduction of traffic congestion, and the attempt to reduce traffic congestion by providing for alternate means of transportation are valid public purposes for which zoning has been allowed in the past.⁷⁸

69. *Dolan*, 114 S. Ct. at 2313.

70. *Id.*

71. *Id.* at 2314.

72. *Id.*

73. *Id.* at 2314-15.

74. *Id.* at 2321-22.

75. *Id.* at 2322.

76. *Id.* at 2321.

77. *Id.* at 2319-20.

78. *Id.* at 2317-18.

According to the Court, the City's land-use regulations as applied in this case differed from those previously sanctioned for two reasons.

First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city . . .⁷⁹

The Court utilized a two-step analysis to examine the takings issue presented by the *Dolan* case.⁸⁰ First, the Court determined that an "essential nexus" existed between the 'legitimate state interest' and the permit condition exacted by the city."⁸¹ Second, after concluding that a nexus did exist, the Court analyzed the "degree of connection between the exactions and the projected impact of the proposed development."⁸² After distinguishing the zoning restrictions at issue in *Dolan*, the Court stated the new test to be used in determining the constitutionality of future local land-use regulations.

We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.⁸³

The rough proportionality test is very ambiguous. The Court found that there was a reasonable relationship between the public interest (i.e., the bicycle/pedestrian pathway) and the Fanno Creek dedication resulting from the building development, but that there was not a close enough connection to satisfy the rough proportionality test.⁸⁴ The test goes beyond merely articulating a new standard of proof—it

79. *Id.* at 2316.

80. *Id.* at 2317-18.

81. *Id.* The "essential nexus" test was first articulated by the Supreme Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987). In *Nollan*, property owners wanted to construct a home on a beachfront lot, but the Commission required an easement from them before granting a building permit. *Id.* at 827-29. The Court found that protecting the visual access of the ocean was a legitimate public interest. *Id.* at 831. However, the Court held that there was no nexus between the public interest and the City's permit condition that required beachfront homeowners to grant an easement. *Id.* at 836-37. The Court found that the required easement was an unconstitutional taking. *Id.* at 835-37.

82. *Dolan*, 114 S. Ct. at 2318 (discussing *Nollan* and *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)).

83. *Id.* at 2319.

84. It has been suggested that one result of *Dolan* will be the reinvigoration of the use of Environmental Impact Statements ("EIS") as a means for governments to demonstrate "the proportionality (or other forms of appropriateness) of their permitting or legislative decisions." Stephen L. Kass & Michael B. Gerrard, *The EIS at 25*, N.Y. L.J., Oct. 28, 1994, at 3, 9. This would bring heightened stature to the EIS, which

completely shifts the burden of justifying the regulation from the landowner to the government.⁸⁵

At this juncture, it is too early to ascertain the impact of this important decision on the power of local governments to exercise land-use authority and set the rate of development in their respective communities. However, it seems that by establishing a new rough proportionality test and shifting the burden of proof to the government, the Court has made it more difficult to safeguard the environment through traditional zoning. The government must now support its zoning regulations designed to protect the environment with more certainty.

Whether the new test will be applied solely to individual administrative land-use determinations and zoning variance petitions, and not to regional land-use plans, is not clear. One commentator has suggested, "[i]t was significant that the Court had held that while Tigard had not justified these precise restrictions, the city could have simply banned all development in its flood plain. Many local land-use ordinances prohibit rather than restrict, development in flood plains"⁸⁶

The *Dolan* case does not affect legislatively crafted regional land-use plans that are intended to alleviate environmental problems, because these plans apply to everyone in the area. Therefore, a "phased growth" land-use plan enacted by the New York Legislature aimed at improving and maintaining high air quality in the New York "severe ozone nonattainment" area would withstand such a judicial challenge.

There is precedent from other jurisdictions for limiting certain types of development that would exacerbate environmental problems. In *Save a Valuable Environment v. City of Bothell*,⁸⁷ the Supreme Court of Washington invalidated a local zoning ordinance as it applied to a proposed construction of a major shopping center for its failure to adequately consider the environmental effects outside of the municipality's borders. In *Save*, the Court held:

[w]here the potential exists that a zoning action will cause a serious environmental effect outside jurisdictional borders, the zoning body must serve the welfare of the entire affected community. If it does not do so it acts in an arbitrary and capricious manner. The precise

was designed to "provide a reasoned basis for governmental actions affecting individuals as well as the public generally." *Id.*

85. One of the main purposes of environmental law is to protect our natural resources, such as the air we breathe. When legislating to protect the public health and welfare, it is necessary to be as certain as possible that the regulation is required. However, this is not an exact science. Protecting the public interest, as the government tries to do in environmental and land-use regulation, sometimes requires the government agency to err on the side of caution. *Dolan* has the potential to dramatically increase the cost of regulation, by dissuading earnest regulators from doing their job of aggressively protecting the public because of the cost of defending their decisions.

86. Greenhouse, *supra* note 2, at 10.

87. 576 P.2d 401 (Wash. 1978).

boundaries of the affected community cannot be determined until the potential environmental effects are understood. It includes all areas where a serious impact on the environment would be caused by the proposed action. The impact must be direct. For example, areas which would experience an increased danger of flooding or air pollution . . . would be part of the affected community.⁸⁸

The *Save* court recognized that there are several environmental situations that would be addressed by and justify a regional zoning plan.

A municipality's zoning regulations, as an exercise of its land-use authority, may be challenged if they allow significant population growth without taking into account the increased VMTs that will be engendered by that growth. This increase will make compliance with the ozone related sections of the SIP more difficult.

In considering the standing issue, would the Department of Environmental Conservation ("DEC"), after writing the SIP that would include land-use TCMs, or the Attorney General, have standing to enforce the provisions? If not, the state could then risk losing federal financing for highway improvements if the plan did not conform to the regional plan for attaining clean air.⁸⁹ At the present time, it is difficult to foresee the DEC's enforcement of land-use provisions to limit the number of VMTs because the agency does not believe they are necessary to achieve the NAAQS, and are not included in the SIP today. However, if the land-use TCMs became more acceptable politically and were included in the SIP, the DEC would be able to enforce them.

In *Save*, the court approved the standing of a nonprofit community organization to challenge the municipality's zoning decision because it would have an adverse impact on the regional environment.⁹⁰ Perhaps a nonprofit organization could challenge a municipality's zoning ordinance if it could show that there would be an increase in the VMTs from the development and that this would violate the SIP's provisions for ozone.

There is precedent for state action to enforce a moratorium on growth at the local level to comply with federal environmental standards,⁹¹ such as the federal Clean Water Act.⁹² "Temporary restraints necessary to promote the overall public interest are permissible. Permanent interference with the reasonable use of private property for the purpose for which it is suited is not."⁹³ One recent example on

88. *Id.* at 405.

89. *See id.*

90. *Id.* "We adopt the federal approach to the requirements of standing to gain review of this zoning action. We find SAVE has adequately alleged direct and specific harm to its members which would flow from the building of a shopping center near their homes in North Creek Valley." *Id.* at 404-05.

91. *See Charles v. Diamond*, 360 N.E.2d 1295 (N.Y. 1975).

92. 33 U.S.C. § 1251 (1977).

93. *Charles*, 360 N.E.2d at 1300.

Long Island involves the impact of the rate of development by local communities on a regional pollution problem.⁹⁴

A federally sponsored study of the degradation of the water quality of Long Island Sound had determined that high amounts of nutrients from sewage treatment plant discharges were primarily to blame.⁹⁵ It was also learned that "most of the sewage treatment plants in the Sound's watershed are at or over capacity . . . due to the extensive growth and development in these areas."⁹⁶ To slow the degradation of the Sound, the study recommended establishing baseline quantities limiting nutrient discharges from sewage treatment plants, forcing them to comply using state enforcement.⁹⁷ As a result of this limit, each plant "would not be able to accept further hookups into the sewer system unless [it] was expanded or retrofitted in order to maintain its maximum nutrient discharge limit."⁹⁸

By analogy, an argument can be made that if it is legitimate to put limits on the growth of communities at the local level to clean up the Sound, it should be feasible to limit the urban sprawl and the VMTs that accompany it. One proposal to reduce the number of vehicle miles traveled in a region afflicted with urban sprawl calls for local zoning bodies to require the developers of new communities to include in their plans some form of mitigation to offset increases in automobile emissions. These would be added to the region's total calculation of its NAAQS ozone levels.

A "phased growth" zoning plan would allow communities seeking to promote growth to achieve their goal. But the question of whether developers of private land can be compelled to offset the highly speculative increase in VMTs, or include some other type of mitigation in their zoning plans, has come into question recently. *Dolan*⁹⁹ diminishes the ability of local governments to condition the approval of development of private property subject to environmental restrictions in "phased growth" scenarios.

Land-use reform discouraging the use of single occupant automobiles is a difficult political issue. Many industries would lose money if land-use initiatives were implemented. For instance, any plan that would reduce reliance on cars would not be well-received by the automobile industry, the oil and gas industry, and advertisers who profit from these industries.¹⁰⁰

94. See Sterthous, *supra* note 48, at 203 n.171 (citing LONG ISLAND SOUND STUDY, STATUS REPORT AND INTERIM ACTIONS FOR HYPOXIA MANAGEMENT 10 (Dec. 1990) [hereinafter L.I.S.S.]).

95. *Id.* (citing L.I.S.S. at 27).

96. *Id.*

97. *Id.* (citing L.I.S.S. at 34).

98. *Id.*

99. *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

100. Letter from Professor Norman Williams to Peter Taub (Apr. 2, 1994) (on file with author).

The opposition from interest groups would be strong, making it necessary for any effective land-use reform strategy to include industry support for any proposed reform. This difficulty may help explain the New York Legislature's lack of will to enact and implement land-use reform.

Real estate developers are another important group to consider. Developers earn substantial amounts of money by developing land located some distance away from cities, which is a primary cause of urban sprawl. Perhaps developers can be given incentives or tax breaks to redevelop areas in or near cities, thereby encouraging people to remain who would otherwise leave the city for the suburbs.

If people remain in the cities, it could lead to a revitalization of urban centers that have suffered from declining tax revenues, improve the quality of life and the environment in cities, and help meet federal clean air goals.¹⁰¹ The CAA Amendments could provide the incentive to begin the move in this direction.

CONCLUSION

The public does not respond well to efforts that require lifestyle changes, nor do large public and private employers. The Employee Trip Reduction Plan,¹⁰² one of the central elements of New York's SIP, is already proving to be unpopular. To lower the number of vehicle miles traveled, the ETR requires large employers to encourage their employees to carpool or take mass transit. Employers resist being subject to yet another "burdensome" regulation, and employees resent the government dictating changes in their way of life. Cars are convenient and an integral part of our culture. The independence that cars represent is highly valued by society. Accordingly, a less intrusive alternative to regulation would be more effective in meeting CAA Amendment requirements.

Public resistance to key elements of New York's SIP, the ETR and enhanced I/M programs, do not bode well for the plan's success. This, in turn, will lead the New York DEC to propose some new, stricter measures to reduce the level of ozone to ensure compliance with federal Clean Air guidelines, with the risk that the public will not react favorably to them either. To prevent this cycle of regulation, public resistance, and stricter regulation, the New York Legislature should be encouraged to enact land-use reform immediately. A regional land-use plan would go a long way toward improving the air quality and health of the citizens of New York, and would allow the state to avoid the consequences of failing to achieve the NAAQS for ozone,

101. REPLOGLÉ, *supra* note 23, at 56. "Implementation of such changes in growth patterns will in many cases require new regional and local strategies to better ensure that every jurisdiction can provide safe neighborhoods and schools attractive to middle class families with children." *Id.* at 73.

102. See N.Y. TRANSP. LAW § 14(31) (McKinney 1993).

including an inability to obtain federal highway funds and a ban on industrial expansion in the region.

