A Constant and Difficult Task: Making Local Land Use Decisions in States with a Constitutional Right to a Healthful Environment

Michelle Bryan Mudd

Follow this and additional works at: http://scholarship.law.berkeley.edu/elq

Recommended Citation
Available at: http://scholarship.law.berkeley.edu/elq/vol38/iss1/1

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38SN9W

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jceralaw.berkeley.edu.
A “Constant and Difficult Task”: Making Local Land Use Decisions in States with a Constitutional Right to a Healthful Environment

Michelle Bryan Mudd*

This Article examines the role local governments play in four states that have constitutional rights to a healthful environment—Illinois, Pennsylvania, Montana, and Hawaii. Scholars such as John R. Nolon and Patricia E. Salkin have long noted that local governments work as quiet yet integral third partners with state and federal government by addressing environmental issues through land use regulation. For local governments in environmental rights states, environmental protection is not just an aspiration, but a constitutional mandate. Indeed, environmental rights cannot be fully protected without the strong engagement of local government.

This Article describes the constitutional provisions of Illinois, Pennsylvania, Montana, and Hawaii, and summarizes how the environmental rights case law intersects with the land use law in each state. Here, the Article updates much earlier comparative scholarship on environmental rights, using a land use lens. It also builds on the observations of Barton “Buzz” Thompson and other environment rights scholars who have noted a gap between the constitutional right to a healthful environment and its regulatory implementation. It is local government that can fill much of this gap.

* Assistant Professor and Director of the Land Use Clinic, University of Montana School of Law. My thanks to research assistants DarAnne Dunning, Andrew Gorder, Erin Kraft, Ryan “Nick” Jones, and Elizabeth White for their valuable assistance. My gratitude, as well, to Hillary Wandler, Bari Burke, and John J. Mudd for their thoughtful editorial suggestions. Additional thanks to the Montana Law Review, the Honorable James R. Browning Symposium on the Montana Constitution, and the Association of American Law Schools Section on Natural Resources Law, “New Voices” Panel, for the opportunity to present this article at their respective events. Finally, thanks to my local government clients, whose work inspires me to find practical paths within the large forest of land use law.
Next, this Article combines the theoretical with the practical by presenting a checklist of topics that local governments can consider in designing regulations that protect environmental rights. Even in states lacking a constitutional right provision, local governments can benefit from the practical suggestions offered here. By stepping up to meet their constitutional obligation, local governments in environmental rights states are poised to become leaders in creating and implementing robust environmental land use provisions.

Decision makers will be faced with the constant and difficult task of weighing conflicting environmental and social concerns in arriving at a course of action that will be expedient as well as reflective of the high priority which constitutionally has been placed on the conservation of our natural, scenic, esthetic and historical resources.

—Commonwealth Court of Pennsylvania, Payne v. Kassab

Introduction .................................................................................................................. 3
I. Why Local Government ................................................................................................. 5
   A. Local Governments Have Both the Authority and the Obligation to Safeguard the Constitutional Right to a Healthful Environment ........................................ 5
      1. Express and Implied Regulatory Authority ....................................................... 5
      2. A Constitutional Duty ..................................................................................... 9
      3. A Duty that Exists Despite a Lack of Statutory Guidance ............................ 13
   B. Local Governments Should Seek Judicial Intervention When Environmental Harm May Occur ........................................................................................................ 16
II. A Land Use Lens: State Constitutional Provisions Recognizing a Right to a Healthy Environment ........................................................................................................... 20
   A. Illinois Constitution ............................................................................................... 20
   B. Pennsylvania Constitution ...................................................................................... 24
   C. Montana Constitution ............................................................................................ 28
   D. Hawaii Constitution .............................................................................................. 32
III. Getting Started: Designing a Local Framework that Appropriately Addresses Environmental Rights .............................................................................................................. 37
   A. Invest in Up-Front Planning to Support Future Decision Making .................. 38
   B. Develop Criteria that the Local Government Can Consistently Apply in Land Use Decisions that Implicate the Environment .................................................. 40
      1. Affected Environmental Resources ................................................................... 40
      2. Risks Posed to Environmental Resources ......................................................... 42

INTRODUCTION

From small mountain villages to sprawling, beachfront metropolises, local governments stand on the front lines of environmental regulation. While federal and state agencies figure prominently in environmental law, local governments work as quieter yet integral third partners by addressing environmental issues during the planning and regulating of land use.\(^2\) Local jurisdiction extends into areas not reached by federal and state laws, and local officials are most familiar with the resources in their communities. Thus, a local government’s role in assessing the environmental impacts of land development can be profound. A silent community puts the health of its environment at risk. In a select group of states, a healthful environment is not just an aspiration, but a constitutional duty.\(^3\)

Nearly every state constitution mentions natural resources or the environment, most often in a public policy statement. See Bret Adams et al., *Environmental and Natural Resources*
Illinois, Pennsylvania, Montana, and Hawaii have recognized the right to a healthful environment—a right that local governments, as creatures of these states, must help uphold. And while the local government duty is apparent, the path to meeting it can be arduous. Local governments struggle with the practical realities of how to assess environmental impacts alongside a host of other considerations, including landowner and community interests in using land. These struggles often take place under state enabling legislation that does not expressly address constitutional obligations, or may even undermine those obligations. Yet despite the challenges, the constitutional obligation remains. With these environmental rights approaching their fourth decade of existence, the time is overdue for local governments to heed their constitutional calling.

This Article presents a practical path for local governments navigating the complexities of an environmental rights provision in their state constitution. Even in states lacking such a provision, local governments can benefit from the practical suggestions the Article provides. Indeed, it behooves all local governments to proactively develop a mastery of environmental issues, rather than to relinquish regulatory opportunity to state legislatures or to courts ill-equipped to handle the scientifically complex, polycentric problems of each community.


4. This Article will not focus on Massachusetts. To date Massachusetts case law has involved the public policy portion of the state’s constitutional provision, and an attempt by an individual to enforce the “right” portion of the constitutional provision was rejected for lack of standing, without any explanation. See Enos v. Sec’y of Envtl. Affairs, 731 N.E.2d 525, 532 n.7 (2000); see also Mary Ellen Cusack, Judicial Interpretation of State Constitutional Rights to a Healthful Environment, 20 B.C. ENVTL. AFF. L. REV. 173, 185–86 (1993). Thus, there is an insufficient body of case law to draw upon.

5. The phrase “environmental rights” is used throughout the article to denote the constitutional right to a healthful environment contained in the state constitutions of Illinois, Pennsylvania, Montana, and Hawaii. See supra text accompanying notes 3–4.

6. In states without a right, there is likely a constitutional policy provision, an environmental statutory scheme, or both. See Thompson, supra note 3, at 867–80, tbls.1, 2, 3, 4 & 5.

Part I argues that local governments in environmental rights states are constitutionally bound to safeguard the environment, both through regulation and use of the courts. Part II then focuses on the specific legal context of each environmental rights state, summarizing the interface between that state's environmental rights case law and land use law. This comparative analysis reveals some remarkable differences among the four states, as well as important commonalities that help us predict future developments in environmental rights jurisprudence. Part III then moves to the practical level, providing a checklist of topics that local governments should consider when designing a regulatory framework for environmental rights protection. This checklist is drawn from a survey of cases and statutes in the environmental rights states, and recommends such steps as strengthened planning documents, codified environmental review criteria, clarified evidentiary requirements, and required monitoring for compliance. Although variations in state law require some differences in approach, the Article concludes that when local governments proactively address environmental issues, they create processes that better protect the environment, provide predictability for landowners, and are more likely to withstand judicial review.

I. WHY LOCAL GOVERNMENT

A. Local Governments Have Both the Authority and the Obligation to Safeguard the Constitutional Right to a Healthful Environment

1. Express and Implied Regulatory Authority

At the same time that state constitutions began addressing environmental issues in the 1970s, courts began ruling that local governments had implied authority to regulate environmental harms under their existing police powers—those traditional powers to protect public health, safety, and welfare. By this time nearly all states had already delegated to local governments the power to plan, zone, and conduct subdivision review under the police powers. The Standard State Zoning Enabling Act, which most states had adopted in some form, empowered local governments to zone “for the purpose of promoting health, safety, morals, or the general welfare of the community.” And the Standard City Planning Enabling Act authorized planning and review

---

8. See 1 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING §§ 2.9–11 (5th ed. 2010).
of land divisions "to best promote health, safety, morals, order, convenience, prosperity, and general welfare."\textsuperscript{10} Originating in the 1920s, these and similar enabling statutes were unlikely to explicitly mention environmental protection as a matter within a local government's regulatory purview.

Despite this lack of explicit language, the courts in many jurisdictions began finding an implied authority to address environmental harms within the ambit of the local government's police powers.\textsuperscript{11} A Florida court's statement in the 1977 case of\textit{ Moviematic Industries Corp. v. Board of County Commissioners}\textsuperscript{12} is representative of the trend: "We find the inclusion of ecological considerations as a legitimate objective of zoning ordinances and resolutions is long overdue and hold that preservation of the ecological balance of a particular area is a valid exercise of the police power as it relates to the general welfare."\textsuperscript{13} In\textit{ Moviematic}, Dade County, Florida, imposed building restrictions over the Biscayne Aquifer, which the court described as "one of the most permeable aquifers in the world" and a major source of the county's drinking water supply.\textsuperscript{14} Land overlaying the aquifer contained a blue-green algae mat that filtered out pollutants before they reached the groundwater. Development threatened to destroy the algae mat and expose the drinking water supply to pollutants.\textsuperscript{15} The court rejected the landowner's argument that the county lacked authority to restrict land development for environmental reasons, concluding that the police powers include the right to protect the "ecological balance" of an area.\textsuperscript{16}

A few years earlier, in\textit{ Nattin Realty, Inc. v. Ludewig}, a New York court similarly upheld a rezoning in the Town of Wappinger that prevented a landowner from building a planned 342-unit apartment complex because of the risk of sewage system failure and potential harm to adequate water supply.\textsuperscript{17} The court held:

Respecting ecology as a new factor, it appears that the time has come—if, indeed, it has not already irrevocably passed—for the courts, as it were, to take "ecological notice" in zoning matters.

\textsuperscript{10} U.S. DEPT OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT § 7 (1928).
\textsuperscript{12} \textit{Moviematic Indus. Corp.}, 349 So. 2d 667.
\textsuperscript{13} Id. at 669.
\textsuperscript{14} Id. at 670.
\textsuperscript{15} See id. at 669–70.
\textsuperscript{16} See id.
\textsuperscript{17} Nattin Realty, Inc. v. Ludewig, 324 N.Y.S.2d 668, 672 (N.Y. Sup. Ct. 1971).
2011] CONSTITUTIONAL RIGHT TO HEALTHFUL ENVIRONMENT

... [T]he municipality has here presented sufficient evidence to warrant the rezoning of the petitioner's property, for it was prompted to do so by ecological considerations based not upon whim or fancy but upon scientific findings. The definition of "public health, safety and welfare" surely must now be broadened to include and to provide for these belatedly recognized threats and hazards to the public weal. The Town's decision to forego what, undoubtedly, would be substantial additional tax revenue would appear to constitute a recognition that it as well as an owner must subordinate immediate to long-term interests.

The court is not unmindful that zoning changes prompted by such environmental considerations may appreciably limit the uses and profitability of land; yet if both factors were to be placed upon the scales, the Pro bono publico considerations must prevail. If there is substantial evidence sustaining the municipality's determination to rezone because of ecology, the court should not void such legislative determination.18

While neither the Florida Constitution nor the New York Constitution contains a right to a healthful environment, both notably have environmental public policy statements that can serve as support for local regulation of the environment.19 Indeed, the Florida Supreme Court has cited the Florida Constitution as additional authority for the conclusion that environmental regulation falls within local government police powers.20

States with environmental rights provisions arguably have an even stronger basis for implied authority, and the courts of those states have recognized as much. The convention transcripts to the Montana Constitution indicate the delegates' belief that police powers formed a basis for enforcing environmental rights,21 and the Montana Supreme Court has accordingly concluded that "environmental regulations represent a reasonable exercise of the police power."22 Pennsylvania courts have held that a public body must address "ecological

18. Id.

19. See FLA. CONST. art. II, § 7(a) ("It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources."); N.Y. CONST. art. XIV, § 4 ("The policy of the state shall be to conserve and protect its natural resources and scenic beauty . . . ").

20. See Dep't of Cmty. Affairs v. Moorman, 664 So. 2d 930, 932 (Fla. 1995).


22. Seven Up Pete Venture v. State, 2005 MT 146, 327 Mont. 306, 114 P.3d 1009, 1023 (citing W. Energy Co. v. Genie Land Co., 635 P.2d 1297, 1302 (Mont. 1981)). This holding is in the context of state police powers, but the same result presumably would be reached for local police powers.
considerations” as a relevant factor when exercising its police powers. Illinois and Hawaii courts have similarly held that preventing pollution and other environmental harms falls within the police powers.

The 1970s also saw a rise in state and federal responses to select categories of environmental concern. For many state legislatures, this response included supplementing local government enabling statutes to expressly authorize some environmental regulation in land use. This delegation acknowledges the difficulties for states to micro-manage, on a property-by-property basis, every type of land use that might be proposed. While much of this enabling legislation reserves state control over selected environmental matters, or creates spheres of state-local concurrent jurisdiction, the overall result is to further empower local governments to consider the environment in land use decision making.

When considering the myriad land use decisions that affect the environment of each community—decisions that often do not fall under the purview of state or federal environmental review—the significance of this local authority cannot be overstated. As one scholar has observed, “[l]and use change is arguably the most pervasive socio-economic force driving changes and degradation of ecosystems.” A U.S. Department of Agriculture study concluded that between 1982 and 2003, developed land in the United States increased by 48 percent or 35 million acres. This conversion of land creates air and water pollution, increased erosion and runoff, habitat and wetland loss, diminished water supply, and other


25. For examples, see generally 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 [hereinafter Historical Overview]; Nolon, In Praise of Parochialism, supra note 2, at 386–413.

26. Admittedly, there are variations among states concerning whether the courts will liberally or narrowly construe implied authority. These variations have resulted in differing amounts of local government authority to regulate the environment. Nonetheless, the overall trend is one toward broader implied authority. Nolon, In Praise of Parochialism, supra note 2, at 385–86.

27. See generally Nolon, Historical Overview, supra note 27, for areas of state and federal preemption, as well as the large remainder of local government authority. Generally, federal areas of regulation include selected toxic substances, wetlands, endangered species, and discharges into air and water. Within these areas many regulatory exemptions exist. State areas of regulation vary by state, but states often assist the federal government and also commonly review facilities siting and sanitation matters.


29. See id. at 10 fig.1 (citing National Resources Inventory of the Natural Resources Conservation Service, USDA).
harms.\(^{30}\) In the absence of local government action, communities may face these environmental dangers without adequate protection. In other words, the risk of creating an *un*healthful environment would be high.

Our inability to rely solely on state and federal laws is perhaps best demonstrated by the many types of local environmental regulations in place nationwide today. As land use scholar John R. Nolon has observed, "[t]he gradual evolution toward environmental sensitivity in local land use controls has proceeded far enough that a distinct environmental ethic, as opposed to an incidental one, is evident."\(^{31}\) To illustrate, Nolon points to a "host of environmental regulations" that protect sensitive environmental areas such as floodplains, wildlife habitats, groundwater and aquifers, ridgelines and steep slopes, scenic vistas, streams and watercourses, and wetlands.\(^{32}\) Regulations also control specific actions affecting the environment, such as erosion and sediment runoff, solid waste disposal, storm water management, timber harvesting, and vegetation removal.\(^{33}\) Importantly, many of these regulations address nonpoint source pollution, "an urgent problem that generally is conceded to be beyond the reach of federal environmental law."\(^{34}\)

Thus, at this time of heightened local focus on the environment, local governments in the environmental rights states are strongly positioned to assert their authority to undertake environmental regulation. And more importantly, they are unique among local governments in having a concomitant duty to undertake that regulation in a way that protects environmental rights.

2.  *A Constitutional Duty*

Despite this emerging local environmental ethic, in states with environmental rights there remains a surprising disconnect between local regulatory authority and local government action to protect the constitutional right to a healthful environment. Perhaps this inaction is attributable to the view that responsibility for environmental protection resides with state agencies, to the perception that local government enabling authority fails to provide sufficient direction, or to the practical difficulties that leave local governments uncertain of where to begin.

---

32. See id. at 376–77.
33. See id. at 377.
34. Id.
Whatever the reasons for inaction, none obviate the legal reality that these local governments have an obligation to plan, zone, and review subdivisions with environmental rights in mind. For it is a well-accepted principle that all levels of government must discharge their functions in keeping with constitutional mandates and may not “disregard . . . cardinal constitutional guarantees.”

A review of the case law confirms that some local governments do incorrectly perceive that state agencies bear sole responsibility for addressing environmental rights. For example, in Community College of Delaware County v. Fox, a Pennsylvania court observed that although that state’s environmental rights provision “does not specify what governmental agency or agencies may be responsible for its implementation . . . it seems clear that many state and local governmental agencies doubtless share this responsibility.” There, the litigants assumed that the Pennsylvania Department of Environmental Resources (PDER) was solely responsible for safeguarding environmental rights when permitting a major sewer line extension. The court disagreed, concluding that Delaware County shared that responsibility. Because the county possessed delegated land use powers, it was responsible for analyzing the secondary environmental effects posed by the land development that would inevitably accompany the sewer line extension. Tellingly, the court concluded:

These municipal agencies have the responsibility to apply the [constitutional] mandate as they fulfill their respective roles in the planning and regulation of land use, and they, of course, are not only agents of the Commonwealth, too, but trustees of the public natural resources as well, just as certainly as is the [PDER].

Along similar lines, the transcripts for the 1970 Illinois Constitutional Convention specify that all levels of government should play a role in ensuring a healthful environment, and the delegates called for the state legislature to implement environmental rights through a regulatory system where “the inter and intra governmental efforts

35. E.g., 16 AM. JUR. 2D Constitutional Law § 60 (2d ed. 2010). Even in states with lesser environmental policy provisions in their constitutions, commentators have concluded that those policy statements necessarily imbue the decision making of government officials who must factor public interest and public policy into their decisions. See, e.g., A. E. Dick Howard, State Constitutions and the Environment, 58 VA. L. REV. 193, 209 (1972) (“It is implicit in the character of public agencies that they are to act in the public interest and, in particular, that their acts are to be compatible with public policy as ordained by the Constitution.”).
37. See id. at 481–82.
38. See id.
39. Id. at 482; see also Franklin Twp. v. Commonwealth, 452 A.2d 718, 721–22 (Pa. 1982) (plurality opinion) (observing that local governments have a “constitutional charge” to protect and enhance the quality of the environment for its citizens).
complement one another . . . [through] a coordinated plan of action with uniform standards." Nonetheless, in City of Chicago v. Pollution Control Board, the City of Chicago argued that, because it had home-rule powers, its municipal disposal sites and incinerators were not bound by state environmental regulations. In rejecting the City’s arguments, the Illinois Supreme Court turned to the environmental provisions in the state’s constitution and concluded that Chicago was not insulated from those provisions. While Chicago could legislate concurrently with the state, it could not apply lesser standards that harm the environment. Under Chicago’s argument, “it would be difficult if not impossible for the General Assembly to perform the mandate of maintaining a healthful environment imposed upon it by article XI of the 1970 Constitution.” Implicit in the court’s analysis was the recognition that local governments like Chicago must exercise their authority in a way that safeguards, rather than undermines, environmental rights.

The Hawaii Supreme Court has also clarified that a constitutional duty to protect and promote state environmental resources applies to “the State and its political subdivisions.” In Kelly v. 1250 Oceanside Partners, the County of Hawaii argued that it had no constitutional duty to protect coastal waters from runoff pollution caused by a subdivision development within its jurisdiction because those waters belonged to the state. The Hawaii Department of Health (HDOH) had primary permitting authority over storm water discharge associated with construction activity along Kealakekua Bay, which is classified among Hawaii’s most natural, pristine waters. Despite HDOH’s permitting authority, the county also had state-delegated police powers over grading and grubbing activities to control soil erosion and sediment. The supreme court concluded that both the state and the county had constitutional obligations to protect the environment and that the statutes outlining the county’s responsibilities “would be rendered meaningless if the County were excused from [its regulatory] obligation.”

40. REPORT OF THE GENERAL GOVERNMENT COMMITTEE ON A PROPOSED ENVIRONMENT ARTICLE, 6 COMMITTEE PROPOSALS 697, 700 (1970) [hereinafter COMMITTEE PROPOSALS]. At the same time, the delegates were cognizant of the reality that legislation alone would not suffice, and that a constitutional right was needed as well. See Verbatim Transcript of July 22, 1970, 4 SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 2991 [hereinafter ILLINOIS CONSTITUTIONAL CONVENTION]; Leahy, infra note 97, at 3–4.

42. See id. at 14–15.
43. See id.
44. Id.
45. Kelly v. 1250 Oceanside Partners, 140 P.3d 985, 1003 (Haw. 2006) (emphasis added) (addressing the water resources provision in HAW. CONST. art. XI, § 1).
46. See id.
47. See id. at 990, 1004.
48. Id. at 1004–08.
And in Montana, a recent case illustrates the lingering misperception about the local government's role in protecting environmental rights. There, a county board of adjustment was recently sued for violations of the right to a clean and healthful environment when it authorized a gravel pit in a residential area. Even though counties have concurrent jurisdiction with the state when permitting gravel pits in such areas, the board argued that "the Legislature charged the [Montana Department of Environmental Quality], not the counties, with protecting the right to a clean and healthful environment." While the Montana Supreme Court did not reach this broad argument on appeal, its presence provides a startling reminder of the environmental rights work that remains to be done at the local government level. The board's argument is all the more startling when one considers that the Montana Supreme Court has already enforced environmental rights not only against government entities but against private parties as well.

It is time for local governments in the environmental rights states to squarely recognize their responsibility for protecting those rights in land use decision making—and none too soon.

With land use development continuing to increase, the environmental issues facing local governments promise only to increase in quantity and complexity. As the Hawaii Supreme Court observed in the context of water resources:

As competition for water resources increases, the analysis of both the public interest and of reasonableness must become both more rigorous and affirmative. The counties will be required to articulate their land use priorities with greater specificity. For example, even at the present time, there is more land zoned for various uses than available water to supply those proposed uses. Thus, it is not sufficient to merely conclude that a particular parcel of land is properly zoned . . . .

50. Id. at 290.
51. See Cape-France Enters. v. Estate of Lola H. Peed, 2001 MT 139, 205 Mont. 513, 29 P.3d 1011, 1017. In Cape-France, a private buyer sued a private seller to rescind a contract for the purchase of land after learning of groundwater pollution beneath the property. The buyer, who planned to subdivide the property, would have been required by state subdivision laws to drill a test well that likely would have caused the spread of a contaminated plume and endangered the public health. On appeal, the Montana Supreme Court held, inter alia, that to require specific performance of the contract would be to require the landowner to violate the state's fundamental constitutional right to a clean and healthful environment. The contract was thus voided. See id.
52. See Wu, supra notes 28–29.
... That minimal conclusion may be inadequate to resolve situations in which competitive demand exceeds supply. Further analysis... will be needed.53

An increase in development also promises an increased possibility of litigation over the environmental harms associated with land development. Lawsuits may come from private landowners, from interest groups, or from other state agencies or local governments whose interests and responsibilities touch upon the environment. In the absence of proactive environmental regulation, local governments will continue to be vulnerable to lawsuits alleging violations of the right to a healthful environment.54

A pattern of complacency or inadequate review may also result in the loss of local government authority if the state or federal government determines that protection is better achieved through state or federal control.55 Meaningful environmental protection requires a unified federal-state-local approach; thus it is important that local government remain a credible partner because of the uniquely local perspective and knowledge it brings to the table. For all of these reasons, local governments in Illinois, Pennsylvania, Montana, and Hawaii should proceed to uphold their state's constitution and implement environmental rights—regardless of whether their states have provided clear legislative guidance.

3. A Duty that Exists Despite a Lack of Statutory Guidance

As a general rule, local government land use powers are bounded by the terms of authority delegated from the parent state.56 Thus, state

53. In re Water Use Permit Applications (Waiahole), 9 P.3d 409, 427 (Haw. 2000).
54. When local governments are not proactive, they also leave more environmental decisions in the hands of the judiciary, which can be ill-equipped to handle scientifically complex, nuanced community issues. Brooks, supra note 3, at 1096, 1110 (“The design for such [environmental] compensation or restoration is best achieved at the local level.”).
55. For a classic argument that states should “pull back” local control, see Eric Pearson & Gerald J. Hutton, Land Use in Pennsylvania: Any Change Since the Environmental Rights Amendment?, 14 DUQ. L. REV. 165, 201 (1975–76). For past examples of federal and state intervention on behalf of the environment, see Nolon, Historical Overview, supra note 25, at 834–42 (observing how past environmental harms “left unabated by the land use control system driven by local governments” resulted in state and federal intervention over some environmental matters). See generally Michael F. Reilly, Transformation at Work: The Effect of Environmental Law on Land Use Control, 24 REAL PROP. PROB. & TR. J. 33 (1989) (summarizing the history of federal and state incursions into local government environmental authority).
56. The source of the powers could come from a statute, constitution, charter, or some combination of these sources, depending on the form of local government involved. The numerous variations in local government forms, including those with home rule versus delegated powers, are addressed generally in 1 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING ch. 2 (5th ed. 2010).
delegating statutes serve as the guideposts by which local governments must address environmental rights. These statutes provide guidance ranging from the specific to the general. And in some cases the environment is not mentioned at all, leaving only the existence of implied authority under the police powers. Regardless of the degree of specificity, local governments carry a constitutional obligation to protect environmental rights.

In limited instances, legislatures in the environmental rights states have provided local governments with specific guidance regarding how to address environmental harm. For example, under the Hawaii Coastal Zone Management Act, counties are allowed to permit development in state-designated coastal zones only if the proposed developments either “will not have any substantial environmental or ecological effect” or the adverse effect is minimized and “clearly outweighed by public health, safety, or compelling public interests.” For their part, Montana local governments must request an environmental assessment (EA) for certain categories of subdivisions and apply subdivision review criteria involving impacts to wildlife, wildlife habitat, the natural environment, and public health and safety. And Illinois requires concurrent state-local approval of pollution control facilities, giving local governments a series of criteria to apply in their review process.

Yet even with this statutory guidance, much uncertainty remains. Local governments must still decipher what the statutory criteria mean, what evidence is relevant under the criteria, and how to weigh that evidence. Additionally, there is no guarantee that statutory compliance equals constitutional compliance. A state legislature may provide a statutory baseline that falls short of—or even runs counter to—protecting a healthful environment in a given land use scenario. Take for example the Montana rule requiring proof of adequate water supply in advance of

57. Salkin notes that the forms “resist easy generalization,” but that regardless of the form of government, statutes play a key role in shaping how land use authority is exercised because all states have adopted specific zoning enabling legislation. *Id.* §§ 2.4, 2.6, 6.28; *see also* 1 EDWARD H. ZIEGLER, JR., RATHKOPF’S THE LAW OF ZONING AND PLANNING § 1.8 (4th ed. 2010) (concluding that regardless of the source of authority, “a local ordinance may be held invalid if found to be inconsistent with, and thus preempted by, state law”). This Article focuses principally on enabling statutes as sources of authority, but similar observations can be extended to authority derived from a charter or constitution.

58. Unless the local government elects to challenge the legality of the statute or seeks legislative amendment of the statute. *See discussion infra Part I.B.*

59. *See discussion supra Part I.A.1.*

60. HAW. REV. STAT. § 205A (West 2010).


62. *See MONT. CODE ANN. §§ 76-3-504(1)(b), -603, -608 (2009).*

subdivision approval.\textsuperscript{64} For one subdivision developer in Bozeman, Montana, adhering to this rule would have meant drilling test wells that could have spread a major contamination plume believed to be located beneath the subject property, making compliance constitutionally unlawful.\textsuperscript{65}

In countless other instances the statutes are largely silent, leaving local governments to fall back on their implied authority and exercise best judgment. For example, Illinois subdivision and zoning statutes do not mention the environment.\textsuperscript{66} Likewise, Pennsylvania’s subdivision statutes do not mention the environment\textsuperscript{67} and its zoning statutes only generally require that local government zoning preserve and provide for the protection of the natural environment and its resources.\textsuperscript{68} More general still, Montana zoning must simply “promote public health, public safety, and general welfare” and “encourage[e] the most appropriate use of land throughout the jurisdictional area.”\textsuperscript{69}

In the face of such oblique guidance or statutory silence, local governments may erroneously conclude that they need not consider, or need only minimally consider, environmental rights when regulating land use. But a legislature’s failure to explicitly require something is no reason to ignore a constitutional mandate.\textsuperscript{70} Lamenting the lack of state laws addressing environmental rights, scholars have urged public servants to “consider seriously whether their failure to take into account in decision making all environmental factors will infringe on citizens’ rights to a clean and healthful environment.”\textsuperscript{71} Indeed, “[n]o function of government can be discharged in disregard of or in opposition to the fundamental law. The state constitution is the mandate of sovereign people to its servants and representatives. No one of them has a right to disregard its

\textsuperscript{64} See \textit{Mont. Code Ann.} § 76-3-504(1)(g)(iii) (2009). For subdivisions not connecting to municipal water supply, on-site wells are the typical means of supply.


mandates..."72 Thus, local governments must walk a careful line, ensuring that they operate within their statutory authority while using the full extent of that authority—both express and implied—to ensure constitutional mandates are honored.

B. Local Governments Should Seek Judicial Intervention When Environmental Harm May Occur

While statutes are the guideposts by which local governments address environmental rights, ultimately the judiciary is the guardian and arbiter of those constitutional rights. Not surprisingly, some local governments have moved beyond land use regulations by taking environmental issues to the courts. Some have filed legal proceedings on behalf of their constituents to enjoin other jurisdictions or agencies from permitting a land use that may cause environmental harm in the community. Others have affirmatively challenged state statutes as unconstitutional for failing to protect against environmental harm. While the case law remains unsettled regarding whether local governments are obligated to pursue these legal avenues, it is important to note this trend toward litigation and its complementary role in addressing environmental harms within a local jurisdiction.

The most common litigation example is when a local government suits another agency or jurisdiction to reverse a decision posing a risk to the local government's environment. For example, in Franklin Township v. Commonwealth, a Pennsylvania county and township sued the PDER for permitting a toxic waste landfill in their jurisdictions.73 The PDER questioned whether the local governments had standing to sue over a state regulatory matter.74 The Pennsylvania Supreme Court, citing the state's environmental rights clause, concluded that a strong case for standing existed:

[A] township and a county are more than abstract entities; each is also a place populated by people. They can be identified by fixed and definable political and geographic boundaries. These boundaries

---

74. See Franklin Twp., 452 A.2d at 720.
encompass a certain natural existence—land, water, air, etc. collectively referred to as environment. Whatever affects the natural environment within the borders of a township or county affects the very township or county itself. Toxic wastes which are deposited in the land irrevocably alter the fundamental nature of the land which in turn irrevocably alter the physical nature of the municipality and county of which the land is a part. It is clear that when land is changed, a serious risk of change to all other components of the environment arises. Such changes and threat of changes ostensibly conflict with the obligations townships and counties have to nature and the quality of life. We believe that the interest of local government in protecting the environment, which is part of its physical existence, is “substantial” . . . . Aesthetic and environmental well-being are important aspects of the quality of life in our society, and a key role of local government is to promote and protect life’s quality for all of its inhabitants.  

Whereas many local governments look to emergency regulations as a stop-gap to addressing perceived deficiencies in state agency environmental review, Franklin Township illustrates how litigation can be a supplementary strategy for addressing local environmental concerns.

Local government may also challenge the constitutionality of a land use statute. A statute governing local government, either by its plain language or as applied, may not result in a constitutionally acceptable outcome for the environment. To assume that following a statute equates with constitutional compliance is to overlook the reality that a legislature can effectively nullify a constitutional right. Local governments may

75. Id. (footnotes and internal citations omitted).

76. See generally, e.g., Vill. of DePue v. Viacom Int’l, Inc., 632 F. Supp. 2d 854 (C.D. Ill. 2009) (documenting village’s unsuccessful attempts to adopt local regulations compelling cleanup at a contaminated smelter site because village was dissatisfied with pace of cleanup progress under state law); Liberty Cove, Inc. v. Missoula Cnty., 2009 MT 377, 353 Mont. 286, 220 P.3d 617 (where county adopted emergency ordinance banning gravel pit due to concerns about inadequate review by two state agencies).

77. In some instances the recovery of attorney fees may also be possible, making this type of litigation a more viable option for local governments with limited financial resources. In Pennsylvania, for example, at least one statute awards attorney fees to prevailing local governments in a dispute with a state agency. See 35 PENN. STAT. ANN. § 691.307(b) (West 2010); Solebury Twp. v. Dept. of Envtl. Prot., 928 A.2d 990 (Pa. 2007) (awarding attorney fees to township which challenged proposed issuance of water quality certificate in connection with development project, and holding that the state’s strong policy to justly compensate parties who challenge agency actions requires that the fee-shifting provision in the Clean Streams Act be liberally interpreted).

78. See McLaren, supra note 3, at 135, 139, 149 (discussing the risks of deferring to statutes alone). It also overlooks, as Brooks has aptly observed, the reality that the “system of regulations may fail for myriad reasons: agency capture, bureaucratic mismanagement, inappropriate standardization, unreliable information, distortions from litigation or threat of litigation, costs of administration, incorrect standards and their mistaken application,
thus confront the dilemma of being seemingly forced to apply state land use law in a situation where such application violates state constitutional environmental rights.

Although case law in this area is undeveloped, at least one concurring opinion has suggested that local governments in this situation have an affirmative obligation to seek judicial invalidation of the offending statute. In *Merlin Myers Revocable Trust v. Yellowstone County*, a county commission in Montana denied a proposed gravel pit on land zoned as agricultural because of the environmental risk to a nearby school and some residential properties. Access to the gravel pit was by easement through the school property. Under Montana's zoning enabling statutes, counties are precluded from denying gravel pits in non-residential zones. Rather than following the gravel pit statute, the county commission denied the permit because the mine would violate the Montana Constitution's right to a clean and healthful environment by placing school children and other nearby residents at risk.

The Montana Supreme Court invalidated the county's decision, concluding that the county was obligated to follow state law and that it violated the separation-of-powers doctrine when it found the gravel mining statute unconstitutional. While the court had exclusive authority to decide the statute's constitutionality, it avoided the question and noted that the county could ameliorate environmental harms by imposing mitigating conditions on the gravel operation.

Responding to the constitutional question, the specially concurring opinion of Justice Nelson set the stage for future challenges to land use statutes:

I do not concede that, statute or no statute, a governmental entity can act in a fashion so as to permit or require infringement of the environmental interests protected under ... the Constitution of Montana. If, indeed, the neighborhood school students' fundamental rights to a clean and healthful environment were put at risk because of the operation of [a state statute] ... then the Board should have brought its constitutional challenge in the District Court at the outset.

---

80. *See id.* at 1269–70.
82. *See Merlin Myers Revocable Trust*, 53 P.3d at 1272.
83. *See id.*
84. *See id.*
85. *Id.* at 1273 (Nelson, J., specially concurring) (internal citations omitted).
Under Justice Nelson’s analysis, it is incumbent on local government to seek judicial invalidation of a state statute when its application would result in the violation of environmental rights. Stated another way, local government cannot hide behind a state statute and permit an environmental rights violation to occur. This logic mirrors that of the court’s previous holding in *Cape-France Enterprises v. Estate of Lola H. Peed*, which released a private party from fulfilling its legal obligations when doing so may have caused significant environmental harm. In essence, these rulings point to declaratory judgment actions as a vehicle to fulfill constitutional duties when enabling statutes fall short.

Consistent with Justice Nelson’s analysis, the jurisprudence of the other environmental rights states suggests that local governments may not rigidly follow statutory mandates that violate environmental rights. It is “well accepted in [Illinois] that the constitution is not regarded as a grant of powers to the legislature but is a limitation upon its authority.” Indeed, the delegates to the Illinois Constitutional Convention specifically noted the public’s distrust of the state legislature’s ability to protect the environment through statutes alone, thus clearly indicating an intent that any state statute would yield to the constitutional right. The Pennsylvania Supreme Court has observed that local governments have a “constitutional charge” to protect environmental quality and that they should address environmental matters “without delay,” even when state-level agencies have approved the land use activity creating the environmental harm. And while the Pennsylvania courts have held that local governments are not required to adopt special legislation to specifically implement environmental rights, they must—in order to pass “constitutional muster”—factor environmental rights into their decision making under existing statutes and local ordinances. The Hawaii courts have likewise reminded governments that their statutory powers are circumscribed by constitutionally protected rights. This jurisprudence all points to the conclusion that local governments cannot mechanically follow statutory mandates if in doing so they are violating a known

---

88. See discussion infra Part II.A.
90. See *Blue Mountain Pres. Ass’n v. Township of Eldred*, 867 A.2d 692, 702–04 (Pa. Commw. Ct. 2005). This ruling is based on the fact that zoning is optional in Pennsylvania. Id.
91. Id.
92. See e.g., *Kelly v. 1250 Oceanside Partners*, 140 P.3d 985, 1010 (Haw. 2006) (“Although in some respect, exercise of [the Department of Health’s] authority is discretionary in nature, such discretionary authority is circumscribed by the public trust doctrine.”).
constitutional right. That path leads to potential environmental damage and litigation exposure. Instead, the wiser path is to bring a problematic statute to the court for a determination of the statute's constitutionality.93

Relying on a combination of statutory and judicial guidance will take local governments a certain distance in meeting their constitutional obligations. The rest of the distance must be crossed by using best efforts and educated predictions about environmental rights in each state. Part III assists local governments in this practical planning process. But before proceeding there, Part II provides some context by briefly summarizing the environmental rights and land use regimes in the environmental rights states.

II. A LAND USE LENS: STATE CONSTITUTIONAL PROVISIONS RECOGNIZING A RIGHT TO A HEALTHY ENVIRONMENT

Since their emergence in state constitutions during the 1970s, environmental rights clauses have been examined through a variety of lenses. Among other topics, scholars have inquired into the scope of the rights, the extent to which the rights are self-executing, whether parties have standing to sue, and against whom the rights can be enforced.94 Providing a slightly different lens, this Part focuses on how environmental rights should inform land use regulation in Illinois, Pennsylvania, Montana, and Hawaii.95 Each state's unique constitutional language is set forth, followed by an analysis of how environmental rights intersect with land use laws in that jurisdiction. By viewing the states alongside one another, practitioners can observe common trends and better appreciate features that may be distinct to their particular state. Ultimately, practitioners can then begin to find their way towards environmental regulatory design.

A. Illinois Constitution

Article XI (Environment), Sections 1 and 2:

93. Admittedly, the occasional need to challenge offending statutes in court will present litigation costs for the local government. On the other hand, the government would likely face comparable or even greater costs defending litigation alleging that it violated environmental rights by enforcing a statute that is unconstitutional.

94. For a sampling of such articles, see supra note 3. This article does not directly enter into the debate of whether the environmental rights provisions are self-executing, observing instead that the courts in each state have as a practical matter already applied the provisions to local government land use questions. See discussion supra Part I.A.2.

95. While the states rely in part on state environmental agencies to implement environmental rights, the discussion in this Part is largely focused on local government spheres of authority.
The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations.

The General Assembly shall provide by law for the implementation and enforcement of this public policy.

Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.

In 1970 Illinois became the first state to adopt an environmental right in its constitution. The constitutional convention transcripts reveal that the right is intended to be a fundamental one—an "extension of the right to life"—with a focus on protecting human health. Delegates to the 1970 Illinois Constitutional Convention expressed a reluctance to rely exclusively on the Illinois Environmental Protection Act (IEPA), then recently enacted, because the rights mentioned in that Act "could be abolished by future amendment to the Act" and because there was "no actual assurance that this Act would result in strong State action against pollution." Thus, Illinois citizens took the additional step of placing an environmental right in the Illinois Constitution.

The Illinois courts have issued several strong decisions protecting that state's environmental rights. For example, when environmental and property interests have come head-to-head, the courts have held that property interests—even constitutionally protected ones—are subordinate. The courts have also held that local governments have a

96. See ILLINOIS CONSTITUTIONAL CONVENTION, supra note 40, at 2991, 2998 (including both physical and noise pollution); COMMITTEE PROPOSALS, supra note 40, at 697, 700.

97. Mary Lee Leahy, Individual Legal Remedies against Pollution in Illinois, 3 LOY. U. CHI. L.J. 1, 14 (1972). Leahy was a delegate to the Sixth Illinois Constitutional Convention. Id. at 1. Leahy further observed that the Act, which is couched solely in terms of pollution, is narrower than the range of activities that might affect human health as contemplated in the Illinois Constitution. Id. at 14.

98. See id. at 14; see also ILLINOIS CONSTITUTIONAL CONVENTION, supra note 40, at 2996, 3003, 3006 (noting right of persons to seek judicial invalidation of statutes that violate the environmental right).

99. See e.g., Cobin v. Pollution Control Bd., 307 N.E.2d 191, 193, 199 (Ill. App. Ct. 1974) (affirming cease and desist order against salvage company engaged in open burning of automobiles); A.E. Staley Mfg. Co. v. EPA, 290 N.E.2d 692, 896 (Ill. App. Ct. 1972) (affirming requirement that a manufacturer pay to treat contaminants discharged from private sewer system before they reached a municipal sewage treatment plant and were discharged into state waters). Regulatory priority is separate from the question of whether a regulation constitutes a taking that requires just compensation.
duty to implement environmental rights. Finally, the doctrine of estoppel cannot be used to foreclose environmental rights claims.

Regarding the scope of article XI, the Illinois Supreme Court has narrowly drawn "healthful environment" to encompass direct effects on human health, excluding other types of harms such as harm to animal species or habitats. While Illinois' definition is the narrowest of the four environmental rights states, the Court's approach is directly supported by the convention records.

On the other hand, some Illinois court rulings appear to contradict the intent of article XI. The first is a ruling that Illinois' environmental right is not fundamental. In *Illinois Pure Water Committee, Inc. v. Director of Public Health*, a litigant argued that the right was fundamental, but apparently provided no legal authority to support the argument. The court concluded the litigant had not carried its burden and, presuming the right was not fundamental, applied rational basis review to the government's action. Although the Illinois courts have relied heavily on the convention transcripts when construing article XI, in this case the court unknowingly contradicted clear statements in those transcripts. Had the court classified the right as fundamental, as Montana has classified its right, the court likely would have applied a heightened degree of scrutiny. Paradoxically, in a subsequent case the court noted in passing that the constitutional record does characterize the right as fundamental. Future litigants are thus in a position to renew the fundamental right argument and seek correction of the court's erroneous conclusion in *Illinois Pure Water*.

The second questionable Illinois ruling narrowed a litigant's ability to preemptively stop environmental harm. A statutory provision in the IEPA prevents citizens or affected local governments from challenging agency permits for activities regulated under the Act. On multiple

---


102. See Glisson v. City of Marion, 720 N.E.2d 1034, 1042-45 (Ill. 1999) (concluding plaintiff lacked standing under article XI where a proposed dam and reservoir would harm two threatened and endangered species); see also Scattering Fork Drainage Dist. v. Ogilvie, 311 N.E.2d 203, 210 (Ill. App. Ct. 1974) (finding no connection between harm to a person's ability to hunt and fish and the right to a healthful environment). But see infra Part III.B.1 (noting Pennsylvania's finding that wildlife harms are related to human harms).

103. See sources cited supra note 96.


105. See id.

106. See sources cited supra note 96.

107. See discussion supra Part I.B.


109. See 415 ILL. COMP. STAT. ANN. 5 / 40(a)(1) (West 2010). The only exception appears to be for hazardous waste facilities, where local governments, but not individual citizens, are
occasions the Illinois Supreme Court has upheld the statute and concluded there is no cause of action unless the permitted operation later causes or threatens to cause pollution. 110 This delayed ability to raise environmental rights claims contradicts other holdings by the Illinois courts recognizing that even a likelihood of pollution can be the basis for enforcing environmental rights because some pollution is irreversible and some risks are simply too great. 111 The Act's foreclosure of claims also constitutes a legislative curtailing of a constitutional right, which the convention delegates clearly did not intend. 112

Turning to Illinois' land use statutes, Illinois local governments enjoy broadly delegated powers to plan, zone, and regulate the subdivision of land, although the enabling statutes make no mention of environmental rights. 113 And there are some notable gaps, such as the narrow definition of subdivision, which captures only those divisions of land creating lots less than five acres in size, 114 and the prohibition against county regulation of utilities. 115 Unlike in Montana, however, Illinois counties are allowed to regulate sand and gravel extraction activities. 116

Outside of the general land use statutes, there are a handful of more specific local government provisions related to the environment. Unique among the four states, Illinois cities and villages have broad extraterritorial powers to "prevent or punish any pollution or injury" to waters that may serve as their water supply. 117 Local governments also have concurrent jurisdiction with the state over several permitting matters under the IEPA, including the siting of waste disposal facilities. 118

---

112. See sources cited supra notes 96-98 and accompanying text.
113. See sources cited supra note 66. See also the planning statutes at 55 ILL. COMP. STAT. ANN. 5 / 5-14001 (West 2010) (counties); 60 ILL. COMP. STAT. ANN. 1 / 105-35 (West 2010) (townships); 65 ILL. COMP. STAT. ANN. 5 / 11-12-5, -6 (West 2010) (municipalities).
115. See 55 ILL. COMP. STAT. ANN. 5 / 5-12001 (West 2010).
116. See discussion infra Part II.C.
118. See 415 ILL. COMP. STAT. ANN. 5 / 39.2, 5 / 3.330 (West 2010); see also Local Solid Waste Disposal Act, 415 ILL. COMP. STAT. ANN. 10 / 1 to 6 (West 2010); Solid Waste Planning & Recycling Act, 415 ILL. COMP. STAT. ANN. 15 / 1 to 2 (West 2010). With certain exceptions, the Act requires separate local government approvals in addition to state agency permits. The local government need not conduct a separate environmental review, but it can if it so chooses. See City of Elgin v. Cnty. of Cook, 660 N.E.2d 875, 881-82 (Ill. 1995).
Because local governments cannot directly challenge certain agency permits under the Act, it is particularly important that they take advantage of these areas of concurrent jurisdiction—the local regulation may be the only safeguard between a harmful land use activity and the community.\textsuperscript{119} Local governments can also band together and create Local Land Resource Management Plans under an enabling statute that includes direct authority to plan for "air and land resources quality," "forest lands," "natural resources," and water quality.\textsuperscript{120} Thus, Illinois local governments have some ability to supplement their general land use powers with the more specific powers granted under these environmental statutes.

\section*{B. Pennsylvania Constitution}

Article 1 (Declaration of Rights), Section 27:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

In 1971 Pennsylvania followed Illinois in adopting an environmental rights amendment within its declaration of rights. Article 1, section 27 contains two parts: an environmental rights provision and a separate public trust statement concerning Pennsylvania's natural resources. The amendment was intended not only to provide legal recourse to individual citizens, but to foster a culture where environmental impacts would be considered before government action occurred.\textsuperscript{121} Shortly after passage of section 27, the state began construing the section to require agencies "to act affirmatively beyond statutory requirements to protect the environment for the present and the future."\textsuperscript{122} And the Pennsylvania Department of Environmental Protection, the state's primary environmental agency, along with several other state agencies,

\footnotesize
\textsuperscript{119} For an example of how this concurrent jurisdiction can favor local government, see generally \textit{Village of Carpentersville v. Pollution Control Board}, 553 N.E.2d 362 (Ill. 1990). In that case, a village height restriction prevented Cargill from installing a 100-foot incinerator discharge stack for hazardous waste, even though state and federal law would have allowed the discharge to occur.

\textsuperscript{120} See 50 ILL. COMP. STAT. ANN. 805 / 3 to 4 (West 2010).

\textsuperscript{121} See Howard J. Wein, \textit{The Environmental Amendment to the Pennsylvania Constitution}, \textit{in PENNSYLVANIA ENVIRONMENTAL LAW AND PRACTICE} 16–17 (Terry R. Bossert & Joel R. Burcat eds., 6th ed. 2008). This chapter was previously authored by Franklin L. Kury, who originated and introduced the environmental rights amendment. \textit{Id.} at 15.

incorporated section 27 into its regulatory permitting processes. Commentators at the time anticipated that section 27 would similarly create a local government duty to affirmatively implement environmental rights through land use planning and decision making. True to these predictions, the Pennsylvania courts have concluded that local governments are obligated to address environmental rights in land use decisions.

The case law addressing section 27 is extensive and reveals a trend of strong judicial deference toward development and the agencies rendering land use decisions. Early on, in *Payne v. Kassab*, the Commonwealth Court of Pennsylvania created a three-part test to determine whether the government has met its trustee duties under the public trust portion of section 27:

1. Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
2. Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
3. Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

Although the three-part test was expressly designed to apply in the context of public trust, the courts have extended the same test to the environmental rights portion of section 27. Commentators have criticized the judiciary's use of the three-part test when determining environmental rights, asserting that the test can result in unacceptable levels of environmental harm because it is weighted in favor of property development or economic benefits. Included within the critique is the

---

123. For a list of examples, see Wein, *supra* note 121, at 23–32.
124. See Eric Pearson & Gerald J. Hutton, *supra* note 55, at 185 (arguing strongly for such a duty); Frey, *supra* note 122, at 254–55 (noting the possibility but expressing concern about the administrative burden of such a duty).
125. See discussion *supra* Part I.A; notes 36–39 and accompanying text.
126. Payne v. Kassab, 312 A.2d 86, 94 (Pa. 1973) (ruling that a street widening that eliminated portions of a public river common did not violate public trust responsibilities under section 27). The test apparently originated with the defendant in the case, Pennsylvania Department of Transportation. See Dernbach, *supra* note 7, at 710.
127. See Dernbach, *supra* note 7, at 712.
128. See id. at 696 (noting that the test "utterly ignores the constitutional text" and "is so weak that litigants using it to challenge environmentally damaging projects are almost always unsuccessful"); Horwich, *supra* note 70, at 364 (concluding that the test "yield[s] merely marginal benefits beyond Pennsylvania statutory law" and "strips the [constitutional] provision of much substantive impact"); Pearson & Hutton, *supra* note 55, at 196 ("Unfortunately, rather than propose a standard by which much environmental harm can be avoided, this test strikes a
belief that the test is too deferential to state agency regulations, as demonstrated by the fact that plaintiffs suing under section 27 have been largely unsuccessful.129

Nonetheless, there are several reasons why the Payne test need not be the limit of environmental protection in Pennsylvania.130 First, although part one of the test gives deference to statutes and regulations, litigants can always challenge the constitutionality of such laws. The Pennsylvania Supreme Court has stated that “[w]hile it is appropriate to give due deference to a co-equal branch of government as long as it is functioning within constitutional constraints, it would be a serious dereliction on our part to deliberately ignore a clear constitutional violation.”131 Thus, a court could overturn a particular law and thereby foreclose application of the Payne test altogether.

Second, the Payne test represents a hurdle for plaintiffs challenging a government decision in court—hence the use of the phrase “challenged decision” in part 3 of the test. Arguably, the government itself is not confined to this three-part test when planning and regulating land use. In other words, a government could choose to be more protective than the Payne test requires it to be. So long as it is acting within the scope of its authority, and doing some balancing of environmental harm against other social benefits, a government has discretion in fashioning environmental review under its police powers.132 Moreover, a government decision denying or conditioning activities due to environmental harm will be subject to review under a traditional abuse of discretion standard, thus receiving judicial deference.133

Finally, state agency jurisdiction goes only so far, which leaves a vast universe of non-state-regulated, local land use activities affecting the environment.134 There is an important opportunity for Pennsylvania’s

---

129. See McLaren, supra note 3, at 139. For a list of examples where plaintiffs have lost, see Wein, supra note 121, at 22–23.

130. Pennsylvania commentators concur that “the amendment still remains largely untested as an environmental protection tool” and anticipate that future factual situations “could develop and expand the amendment’s current scope.” See Wein, supra note 121, at 37.


132. See discussion supra Part I.A. The Pennsylvania Supreme Court has stated that although balancing is required, no specific balancing test is mandated. See Eagle Envtl. II v. Commonwealth, 884 A.2d 867, 879 (Pa. 2005) (upholding Department of Environmental Protection review criteria for landfill permits, which contain a harms/benefits test with differing language from the Payne test).


134. See supra notes 30–34 and accompanying text.
local governments to step forward and implement land use regulations that “fill the gap” and more fully protect section 27 rights.\textsuperscript{135}

In the 1970s Pennsylvania was considered to be among those states delegating the most power over land use to local governments, allowing a full range of planning, zoning, and subdivision authority.\textsuperscript{136} These laws exist in a substantively similar form today, with little or no specificity concerning environmental review, and with the exercise of all regulatory powers being discretionary.\textsuperscript{137} The laws, however, do contain a list of land use activities over which the state has preempted local government authority, such as mining, oil and gas, and concentrated animal operations.\textsuperscript{138} Further, county subdivision review powers apply only to land divisions resulting in three or more lots.\textsuperscript{139}

To guide local governments, Pennsylvania has a state Environmental Master Plan—a unique regulatory document that contains policy statements intended to help local governments properly consider environmental factors in land use.\textsuperscript{140} The Plan does not read as a binding mandate, but it specifically calls on local governments to implement its goals through regulations and decision making.\textsuperscript{141} Since 1973, local governments have also held authority to create local environmental advisory councils to conduct fact finding and set policy goals regarding environmental issues in their communities.\textsuperscript{142} Local governments also share concurrent planning and permitting authority with the state in areas

\textsuperscript{135} See Dernbach, \textit{supra} note 7, at 726–29, 731 (observing gaps in the current regulatory scheme, especially related to suburban sprawl and loss of biodiversity); Wein, \textit{supra} note 121, at 37 (listing possible future scenarios where the right may be implicated outside the state agency permitting process).


\textsuperscript{137} See 53 PA. CONS. STAT. ANN. §§ 10301, 10503, 10603–10604 (West 2010) (on planning, subdivision, and zoning, respectively).

\textsuperscript{138} See \textit{id.} § 10603(b). In the area of oil and gas, however, the courts have recently recognized limited authority to regulate the placement of gas wells through zoning, so long as the local government does not tread on the state’s authority to regulate the technical aspects of the gas development. See Huntley & Huntley, Inc. v. Borough of Oakmont, 964 A.2d 855, 864–66 (Pa. 2009) (upholding borough’s denial of gas well drilling in a residentially zoned district where oil and gas wells were not a permitted or conditional use); Penneco Oil Co. v.Cnty. of Fayette, 4 A.3d 722, 730–33 (Pa. Commw. Ct. 2010) (upholding county zoning ordinance that permitted oil and gas development only in certain zoning districts and only by special exception because the primary purpose of the ordinance was to “preserv[e] the character of residential neighborhoods”). Cf. Range Resources-Appalachia, LLC v. Salem Twp., 964 A.2d 869, 875–77 (Pa. 2009) (invalidating township ordinance that comprehensively regulated technical aspects of oil and gas development as preempted by state law). Although amici in the \textit{Range Resources-Appalachia} decision argued that article 1, section 27 of the Pennsylvania Constitution should be applied so that there are “shared state and local responsibilities to protect the environment” in oil and gas development, the court did not address this argument. See \textit{id.} at 873.

\textsuperscript{139} See 16 PA. STAT. ANN. § 5204 (West 2010).

\textsuperscript{140} See 25 PA. CODE §§ 9.1–.301 (West 2010).

\textsuperscript{141} See \textit{id.} § 9.3(k). Discussed further infra Part III.A.

\textsuperscript{142} See 53 PA. CONS. STAT. ANN. §§ 2322, 2324 (West 2010).
like air pollution, sewage, and development along the Appalachian Trail.\textsuperscript{143} Thus, on the whole, great potential exists for Pennsylvania local governments to engage in environmental planning and use their broad land use powers to implement environmental goals.

C. \textit{Montana Constitution}

Article II (Inalienable Rights), Section 3:

All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

Article IX (Environment & Natural Resources), Section 1:

The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations. The legislature shall provide for the administration and enforcement of this duty. The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

In 1972 Montana adopted a new state constitution containing two separate environmental clauses that reflect a corresponding environmental right and environmental duty. Whereas the other states speak of a duty to maintain the environment, Montana stands alone in requiring a duty to maintain \textit{and improve} the environment—a duty that extends both to the government and the people. Those calling for a constitutional convention in the late 1960s cited the "compelling need for stronger constitutional provisions to ensure environmental protection."\textsuperscript{144} The convention commission also "stressed the citizen's right to a healthful environment as a priority issue."\textsuperscript{145}

While the convention delegates rigorously debated the phrasing of the environmental clauses, they were in accord that the right would be the "strongest constitutional environmental section of any existing state


\textsuperscript{145} Id. (citing MONTANA CONSTITUTIONAL CONVENTION COMMISSION, STUDY NO. 10, BILL OF RIGHTS 250 (1971)).
constitution.146 Unlike the Illinois constitutional delegates, who rejected use of the word "clean,"147 the Montana delegates chose both "clean" and "healthful" to describe the type of environment to which citizens are entitled. Viewed within the larger article II declaration of rights, the right to a clean and healthful environment appears in the section on inalienable rights, listed ahead of other individual rights such as freedom of religion, assembly, and speech, which appear in later sections. And within the inalienable rights section, the environmental right is listed ahead of the other inalienable rights such as "acquiring, possessing and protecting property." This constitutional prioritizing has been borne out in the case law, where the Montana Supreme Court, similar to the Illinois courts, has placed environmental protections ahead of property rights.148

Whereas Pennsylvania's case law began developing almost immediately after adoption of its environmental rights provision,149 Montana's environmental provisions lay relatively dormant for two decades. During this period, scholars speculated as to whether the Montana courts would limit the provisions the way the Pennsylvania and Illinois courts had done and argued for a stronger application of Montana's environmental right.150

In 1999 the Montana Supreme Court resolved many of those questions when it issued its landmark decision in Montana Environmental Information Center v. Department of Environmental Quality (MEIC), holding that Montana's right to a clean and healthful environment is a fundamental right that requires the government to show a compelling state interest before allowing environmental harm to occur.151 In MEIC, the plaintiffs challenged a mining exploration license and related permits that allowed a company to discharge arsenic into the Blackfoot River and Landers Fork River.152 These rivers provide important fish and wildlife habitat, including critical spawning and rearing habitat for the threatened

---

146. Verbatim Transcripts of March 1, 1972, 4 MONTANA CONSTITUTIONAL CONVENTION 1200, 1214 (1971-72).

147. See Glisson v. City of Marion, 720 N.E.2d 1034, 1042 (Ill. 1999) ("'Healthful' is chosen rather than 'clean,' . . . because 'healthful' describes the environment in terms of its direct effect on human life while the other suggestions describe the environment more in terms of physical characteristics.").

148. See State ex rel. Dep't of Health & Envtl. Scis. v. Green, 739 P.2d 469, 473 (Mont. 1987) (holding that law regulating motor vehicle junkyards validly protects right to a clean environment and outweighs property interests); State v. Bernhard, 568 P.2d 136, 138-39 (Mont. 1977) (same); see also discussion supra Part II.A regarding Illinois.

149. See discussion supra Part II.B.


152. See id. at 1238.
By using groundwater mixing zones, the company proposed to dilute the arsenic to levels below applicable state water quality standards; however, the discharge was nonetheless "at greater concentrations than existed in the receiving water." The state agency granted the exploration license under a statutory exemption that allowed such discharges without nondegradation review.

The supreme court applied strict scrutiny to the agency's actions, concluding that there was no compelling reason to allow such an exemption. The ruling was also notable for its prospective view of environmental harm: the possibility of environmental harm is sufficient to state a cognizable claim. In historic language, the court stated:

"[W]e conclude that the delegates' intention was to provide language and protections which are both anticipatory and preventative. The delegates did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment. Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked." Based on Montana's strong constitutional language and the judiciary's strong affirmation of environmental rights, Montana's environmental provisions are considered the most robust of all the state environmental rights provisions.

Although environmental litigants in Montana now routinely raise environmental rights claims based on MEIC, the court has largely avoided those claims when there are other paths to resolving the cases. Given the limited number of court rulings, many contours of the right remain to be defined. One notable exception is Cape-France Enterprises v. Estate of Lola H. Peed, where the court applied environmental rights in the context of a private contract and described a compelling interest as "at a minimum, some interest of the highest order and . . . not otherwise being served or the gravest abuse endangering a paramount government
CONSTITUTIONAL RIGHT TO HEALTHFUL ENVIRONMENT

interest." But even on this issue the court has yet to hear a case where the state has demonstrated a compelling interest. Further, as scholar Barton "Buzz" Thompson has observed, the court has not yet delved into the more difficult scenario of a permit issued after an agency has done full environmental review. While practitioners can only speculate on what the court might do in such a situation, one probable forecast is that the court will part company with Pennsylvania by more rigorously scrutinizing the agency's fact finding when environmental rights are implicated.

Like Pennsylvania and Illinois, Montana's zoning enabling statutes predate its environmental rights provision and make very little mention of the environment at all. Thus, in this area local governments are left to chart their own courses in implementing environmental rights. And, like the other two states, Montana has major environmental gaps in its enabling statutes—most notably in the significant types of land development exempted from subdivision review, such as divisions resulting in lots 160 acres or greater and divisions among family members. Additionally, "minor" subdivisions can be sequentially created without environmental assessment. In zoning, as mentioned above, counties are precluded from fully regulating mining, sand, and gravel extraction activities. Further, individual landowners can use a statutory protest provision to prevent county lands from being zoned, circumventing local authority over environmental protection. These gaps are reminiscent of the categorical mining exemption at issue in MEIC, suggesting a path for future legal challenges.

161. See Thompson, Constitutionalizing, supra note 158, at 179-80, 183-93. This is in contrast with the facts of MEIC, which involved agency approval without environmental review. Discussed supra in the text accompanying notes 150-155.
162. Cf. Clark Fork Coal. v. Mont. Dep't of Envtl. Quality, 2008 MT 407, 347 Mont. 197, 197 P.3d 482, 488, 491-92 (concluding that ordinary agency review applies if the constitutionality of an environmental statute or regulation is not raised, but also concluding the agency abused its discretion under the facts of the case).
163. See sources cited supra note 69.
164. See MONT. CODE ANN. §§ 76-3-103(15), -104 (2009). While this is a much broader definition than Illinois' subdivision definition, it still leaves room for great environmental harm. As one example, consider Plum Creek Timber Company subdividing and developing thousands of acres of its unzoned land holdings in the Crown of the Continent into parcels of 160 acres, each with a new residence and a new road system, without any environmental review. While the government and conservation groups have stepped forward to purchase some of these lands, thousands of acres remain open to development. For more information, see Montana Legacy Project, NATURE CONSERVANCY, http://www.nature.org/wherewework/northamerica/states/montana/preserves/art29100.html (last visited Aug. 5, 2010).
165. See MONT. CODE ANN. § 76-3-207(1)(b) (2009).
166. See id. § 76-3-609(2).
168. See id. § 76-2-205(6).
On the other hand, the enabling statutes for both planning and subdivision review do contain some post-constitutional provisions that provide more environmental guidance. The Growth Policy Act, for those jurisdictions wishing to adopt a growth policy, requires a survey of natural resources and encourages the use of "land use incentives and techniques" that will reduce environmental harms. The Subdivision & Platting Act also requires environmental assessments for certain "major" subdivisions, along with requiring all reviewed subdivisions to be examined for their impacts to wildlife, wildlife habitat, public health, and the natural environment. Local governments enjoy concurrent jurisdiction over water and sanitation in subdivisions, as well as authority to enact more stringent regulations than the state. Thus, Montana local governments, like those in Illinois and Pennsylvania, are generally well situated to design local plans and regulations that address environmental rights.

D. Hawaii Constitution

Article XI (Conservation, Control and Development of Resources), Sections 1 and 9:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources.

Hawaii in 1978 was the last of the states to create an environmental rights provision. As the above provisions reflect, Hawaii has paired its environmental rights provision (article XI, section 9) with a separate public trust provision for natural resources (article XI, section 1). Like Montana, Hawaii chose "clean and healthful" to modify its environmental right. Its public trust provision embraces a broad array of

170. See MONT. CODE ANN. §§ 76-3-603, -608 (2009). Further, these criteria are a statutory minimum that can be augmented by local government subdivision regulations. See Burnt Fork Citizens Coal. v. Bd. of Cnty. Comm'rs, 951 P.2d 1020, 1023–24 (Mont. 1997).
171. See MONT. CODE ANN. § 76-3-511 (2009).
natural resources beyond the water resources traditionally associated with the common law public trust doctrine. Following similar rulings in the other environmental rights states, the Hawaii Supreme Court has held that local government land use decisions must consider and uphold these environmental rights provisions, even when state agencies also play a role in the environmental review process.\textsuperscript{172}

Although more case law has focused on section 1 than section 9, both provisions substantively relate to the environment and practitioners can thus draw on section 1 jurisprudence when interpreting section 9. Additionally, the Hawaii courts have created an analytical framework for another resource-based right that appears in the Hawaii Constitution at article XII, section 7—the gathering rights of native Hawaiians.\textsuperscript{173} While the native rights provision is worded differently than the environmental rights provision, there is potential to draw on native rights jurisprudence as well when analyzing section 9 claims.

At least one commentator has concluded that section 9 does not create a substantive right, but rather is "defined by statutes, administrative rules, and ordinances."\textsuperscript{174} Certainly, section 9 looks to enacted laws to define what is "clean and healthful," but a conclusion that the right is no greater than those laws is problematic. For example, if a statute is silent regarding an environmental issue, does that mean no right exists in that particular context? Or, is it sufficient to simply meet the procedural requirement of submitting an environmental impact statement (EIS), but then proceed to choose an alternative that harms a citizen's right to a clean and healthful environment? Presumably, such outcomes would not be reasonable under article XI, section 9. A conclusion that statutes are coextensive with a constitutional right runs counter to the recognized reality that statutes sometimes fall short of fully protecting constitutional rights and contradicts the general proposition that statutes

\begin{small}
\textsuperscript{172} See Kelly v. 1250 Oceanside Partners, 140 P.3d 985, 1002-06 (Haw. 2006). This holding makes sense when considering that environmental review under Hawaii Environmental Policy Act (HEPA) is informational only and does not require that the government actually choose an alternative that protects environment rights. See \textit{infra} note 186 and accompanying text. Further, HEPA contains many exemptions for land use activities. See \textit{infra} note 187 and accompanying text. Thus, a local government must go beyond any HEPA analysis to ensure meaningful environmental protection within its jurisdiction.

\textsuperscript{173} Article XII, section 7 reads: "The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights." For the analytical framework, see \textit{Ka Pa'akai O Ka'Aina v. Land Use Commission}, 7 P.3d 1068, 1083-84 (Haw. 2000), which is discussed in Chasid M. Sapolu, Comment, \textit{Dumping on the Wai'Nae Coast: Achieving Environmental Justice Through the Hawai'i State Constitution}, 11 ASIAN-PAC. L. & POL'Y J. 204, 239-40 (2010).

\end{small}
cannot legislate away a constitutional protection. Indeed, the Hawaii Supreme Court has held that: “While the [environmental] right is ‘subject to reasonable limitations and regulation as provided by law,’ that provision does not suggest that legislative action is needed before the right can be implemented. Put another way . . . the right exists and can be exercised even in the absence of such [reasonable] limitations.”

Further, in a case involving native rights, the Hawaii Supreme Court has stated that, even when deferring to agency expertise, “[w]e answer questions of constitutional law by exercising our own ‘independent constitutional judgment [based] on the facts of the case . . . [T]his court is the ‘ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawai’i Constitution.’” In the context of the public trust, the court has noted that agency discretion is circumscribed by constitutional doctrine: the courts, not agencies, hold the ultimate authority to interpret and defend constitutional rights. Also with respect to the public trust, the court has held that state codes do not subsume or supplant constitutional provisions; that courts will take a “‘close look’ at the agency action to determine if it complies with the public trust doctrine”; and that courts will not act “merely as a rubber stamp for agency or legislative action.” Further, regarding agency application of the Hawaii Environmental Policy Act (HEPA), the court has said that “blind deference” is “not appropriate.” A similar analysis should extend to section 9 rights, as there is no reason to believe the courts would relinquish their traditional powers over environmental rights when they have so ardently asserted those powers when deciding other environmental constitutional questions.

Scholars are correct, however, in observing that Hawaii depends heavily on state environmental statutes and implementing regulations to carry out the provisions of section 9. As noted in Part I, the state relies upon the Hawaii Coastal Zone Management Act, with a significant amount of environmental review authority delegated to the counties. And most significantly, the state relies on HEPA. The types of actions subject to HEPA are quite broad, extending to numerous local land use

175. See discussion supra Parts I.A.2-3.
177. Ka Pa‘akai O Ka‘Aina, 7 P.3d at 1078.
178. See Kelly v. 1250 Oceanside Partners, 140 P.3d 985, 1010 (Haw. 2006); Waiahole, 9 P.3d 409, 445 (Haw. 2000).
179. Waiahole, 9 P.3d at 442-43, 456.
180. Sierra Club v. Dep’t of Transp., 167 P.3d 292, 310 & n.26 (Haw. 2007) (discussing agency exemptions and noting that California courts employ de novo review of agency exemptions).
182. See HAW. REV. STAT. § 343 (West 2009).
actions such as amendments to county plans, the use of conservation lands and shoreline areas, and the reclassification of conservation lands. HEPA, however, is like NEPA in being informational only, and not substantive. Further, HEPA has categorical exemptions for certain land use activities—single-family residences, multiplexes involving less than four units, small businesses, and zoning variances, to name a few—which leave gaps in the environmental review of land use. To the extent that Hawaii's environmental right has been viewed as ineffective, the criticisms have largely focused on the courts' deference to agency decision making and a lack of enforcement of these environmental statutes.

Turning to Hawaii's land use laws, we find some marked differences from the other environmental rights states. In 1961, just two years after statehood, the Hawaii Legislature adopted the Hawaii Land Use Law, a complex and unconventional land use model that involves state-wide planning, state land classification, and state jurisdiction over selected areas of land use decision making. Planning begins at the state level and then moves down to the county level with local planning that conforms to the state plan. Then in 1978 Hawaii enacted the Hawaii State Plan to improve coordination among agencies and levels of government and to "provide for wise use of Hawaii's resources." The Hawaii Supreme Court has specifically held that the Hawaii land use laws are "environmental laws" subject to article XI, section 9.

The state Land Use Commission (LUC) has classified all land into four major land use districts—urban, rural, agricultural, and

183. For a recent example of the interplay between local land use regulations and HEPA, see Unite Here! Local 5 v. City & Cnty. of Honolulu, 231 P.3d 423 (Haw. 2010).
185. The environmental review process is detailed in Lisa A. Bail et al., Emerging Environmental and Land Use Issues, 9 HAW. B. J. 4, 13 (2005).
186. See HAW. ADMIN. C. § 11-200-8 (West 2010).
187. See generally, e.g., Frankel, supra note 174; McPherson, supra note 184, at 807-08, 830-31.
188. See HAW. REV. STAT. § 205 (West 2009).
190. See generally HAW. REV. STAT. § 226-52 (West 2009). Unlike other states, Hawaii local government land use regulation is housed in counties and not divided between counties and cities. See infra notes 195-196 and accompanying text. Honolulu City-County is the notable exception, but even there, the planning is via a consolidated government process. Department of Planning and Permitting, CITY & CNTY. HONOLULU, http://www.honoluludpp.org (last visited Jan. 17, 2011).
conservation—and has direct governance over conservation districts.192 The LUC also presides over the more significant reclassifications of land, which occur either due to size or due to the land's location in a conservation district.193 Counties otherwise retain considerable control over decisions in the other land use districts and have full discretion to decide permitted uses in urban districts.194 Counties also have considerable discretion in deciding how to conduct subdivision review in the urban, rural, and agricultural districts because Hawaii, unlike Montana, does not have a comprehensive statutory scheme for subdivision review.195

Interestingly, Hawaii's land use classifications appear to assume that environmental issues will largely be associated with conservation lands, resulting in far less protections for the other districts. In agricultural districts, for example, one commentator has noted the exploitation of a "farm dwellings" loophole that allows large subdivisions to locate in agricultural areas.196 Depending on location, these subdivisions could indeed threaten the cleanliness and health of the area's environment. Where these and other regulatory gaps exist, local governments will need to step in with additional protections. To some extent they can fall back on the state's codified environmental policy, which provides direction on how local governments in Hawaii should use their authority to protect the environment. Among the policy's goals are limiting population, balancing economic activities with the environment, and "reduc[ing] the drain on nonrenewable resources."197

***

The above overview serves to provide local governments with the larger environmental context into which they fit. Practitioners can observe that each state constitutional provision has its own unique phrasing and emphasis, along with unique judicial treatment. And each state varies subtly in the authority delegated to local government, the areas of state preemption, the areas of concurrent regulation, and the areas in which more specific environmental criteria exist. Yet within each state's framework lies a broad space for local regulation of the

192. See generally HAW. REV. STAT. § 205 (West 2009). The classifications are found in § 205-2.
193. See id. § 205-4.
197. HAW. REV. STAT. § 344-3 (West 2009).
environment—a space that the courts have said local governments must occupy. Each state affords local government great discretion in planning, zoning, and subdivision review, and some of the states have strong policy statements and state level plans that can act as guideposts on the local path to environmental rights protection. Each state also has statutory and regulatory gaps that create the potential for local governments to use litigation to protect against environmental harms. By synthesizing the statutory and case law from the environmental rights states, practitioners can begin to design a local framework for protecting rights in a more consistent, predictable, and legally defensible manner.

III. GETTING STARTED: DESIGNING A LOCAL FRAMEWORK THAT APPROPRIATELY ADDRESSES ENVIRONMENTAL RIGHTS

This Part provides a starting place for designing local regulations that address environmental rights in land use. While regulatory design is a subject that can be covered far more extensively than this Article allows, the topics in this Part can serve as a checklist of issues for practitioners to consider in the design process. These topics are drawn from common themes that have emerged in the statutes and case law of the four environmental rights states, including:

- proactively addressing environment health at the comprehensive planning stage;
- developing criteria for assessing environmental risks, mitigation options, and countervailing public interests;
- determining how much weight should be placed on environmental risks versus countervailing public interests;
- identifying the types of evidence that will be necessary to decide environmental rights issues;
- making strong factual findings that will withstand constitutional scrutiny;
- guarding against wrongful delegations of authority to developers; and
- monitoring for ongoing compliance of environmental rights after land use permits are issued.

Each local government will undoubtedly be unique in its approach. In some communities that have already developed environmental land use regulations, this process may simply be a matter of better demarcating the connections between existing environmental provisions

198. See discussion supra Part I.A.2.
199. See discussion supra Part I.B.
200. When possible this Part cites precedent from each of the four states, but in some instances a jurisdiction has not yet spoken on a particular topic.
and the constitutional right to a healthful environment. In other communities that have done very little with environmental regulation, the effort will need to be deeper and more comprehensive. The local government attorney plays an essential role in this process. As the discussion in Part II made clear, numerous unresolved questions about environmental rights exist that require analysis and educated guesses from practitioners. The local government attorneys, and in some states the Attorney General as well, will be integral to determining each local government's scope of authority and ensuring compliance with state and federal laws.

A. Invest in Up-Front Planning to Support Future Decision Making

Although the law does not presently mandate that comprehensive plans address environmental rights, the benefits of doing so are significant. Planning documents serve as the foundation for zoning and subdivision review and thus are the starting place for environmental rights regulation. Planning arguably is also the largest area of local government freedom in that the contents of a plan are quite discretionary and flexible. And the studies, policy statements, and goals contained in a community's plan can provide the substantial evidence and rational basis the local government needs to have its environmental decisions sustained in litigation.

The Hawaii Supreme Court has aptly observed that the first step in resource planning should be a strong understanding of a community's environmental needs. Taking this first step ameliorates the chances of "inadvertent and needless impairment" of environmental resources and reduces the "complexity and uncertainty presented by the unsettled question of [environmental resource needs]." In contrast, the absence of proactive planning means "risking an ad hoc planning process driven by immediate demands." This latter scenario is the least desirable because applicants lack certainty, there is no assurance that environmental rights are being protected, and no genuine comprehensive planning occurs.

201. Indeed, outside of Hawaii where planning is mandated, local government planning and zoning is optional and many local governments have likely opted not to fully use their regulatory authority. See overview of the states' land use laws supra Part II.


203. See 4 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 42.39 (5th ed. 2010).

204. See Waiahole, 9 F.3d 409, 460-61 (Haw. 2000) (speaking in the context of water resources).

205. Id.

206. Id.
Thus, to begin planning, local jurisdictions should identify and set goals for critical environmental areas such as water supply recharge areas, habitat areas and corridors, forest areas, and existing areas of contamination and pollution sources. Also important are areas of human vulnerability, such as hospitals, residential areas, and school areas where human health could be most at risk. While there are front-end costs associated with studying, mapping, and setting goals, a local government in the long run can better prove constitutional compliance—and perhaps reduce the likelihood of litigation altogether—when its decisions and regulations are undergirded by a strong rationale established in a land use plan.

Hawaii is to some extent ahead of the pack in its mandatory planning requirements and its identification of critical resource areas—conservation districts, shoreline areas, and special management areas. However, as noted, Hawaii’s approach appears to overlook environmental possibilities outside of these select land use designations. Hawaii local governments should thus look beyond the state classifications to ways that extend environmental protection to agricultural, rural, and urban land use classifications.207

In Montana, growth policies are optional and many local jurisdictions do not have one. But zoning cannot occur without a growth policy, and both zoning and subdivision regulations must substantially comply with the growth policy.208 Thus, the growth policy provides immense regulatory leverage, particularly since it provides broad authority to address natural resources, water supply, wildlife habitat, and wildlife corridors.209

Illinois and Pennsylvania also have promising state-level legislation that supports local environmental planning. While Illinois’ general planning statutes are optional and lack an environmental focus, a separate statute authorizes local governments to join forces and create local land resource management plans to protect environmental resources in their area.210 And although Pennsylvania’s comprehensive planning statutes indicate that planning is optional there as well, those local governments that opt in must include a “plan for the protection of natural . . . resources,” including “wetlands and aquifer recharge zones, woodlands, steep slopes, prime agricultural land, floodplains, [and] unique natural areas.”211 Pennsylvania also possesses one of the strongest

207. See discussion supra Part II.D and accompanying notes.
208. See MONT. CODE ANN. § 76-1-605 (2009).
210. See supra notes 113 and 120 and accompanying text.
211. 53 PA. STAT. ANN. §§ 10301–10302 (West 2010).
state environmental master plans, with the most specific direction regarding local environmental planning.\textsuperscript{212}

Thus, local governments in all four environmental rights states hold the authority to meaningfully plan for environmental rights protection over the long term—a key step to fulfilling their constitutional mandate.

B. Develop Criteria that the Local Government Can Consistently Apply in Land Use Decisions that Implicate the Environment

Turning to the land use regulations themselves, an important preliminary step is to develop criteria that can be predictably and consistently applied in zoning and subdivision review. Developing these criteria will necessarily involve some comparative analysis of the four environmental rights states because of the different wording of their constitutional provisions and the existence of specific statutory and judicial criteria. Nonetheless, there are commonalities. A survey of the environmental rights jurisprudence consistently reveals four criteria that local governments should address in land use: (1) the affected environmental resources, (2) the risks posed to those resources, (3) whether the risks can be adequately mitigated, and (4) any countervailing public interests that support the proposed land use. While this Part will later discuss the relative weight that each state places on these criteria, the discussion will first use case law to help local governments better understand what these criteria mean.

1. Affected Environmental Resources

To fully protect environmental rights, a local government must have a reasonable understanding of the environmental resources affected by a land use proposal.\textsuperscript{213} As a threshold matter, then, local governments must determine what subjects are legally encompassed within the word "environment" in their jurisdiction. As noted, Illinois has the narrowest definition, which is limited to human health impacts and not impacts to wildlife habitat.\textsuperscript{214} Pennsylvania's environmental clause has a long list of protected resources, and the courts have accordingly extended the term beyond human health impacts to historical properties, agricultural operations, and aesthetic values.\textsuperscript{215} And contrary to Illinois, Pennsylvania

\textsuperscript{212} See supra notes 140–141 and accompanying text.

\textsuperscript{213} This factor would be similar to what the Hawaii Supreme Court requires in determining whether native Hawaiian rights are protected during land development. There, the court requires that the government consider "the identity and scope of 'valued cultural, historical, or natural resources' in the petition area . . . ." Ka Pa'akai O Ka'Aina v. Land Use Comm'n, 7 P.3d 1068, 1084 (Haw. 2000). Discussed in Sapolu, supra note 173, at 239–40.

\textsuperscript{214} See supra Part II.A.

has officially recognized that impacts to wildlife habitat can harm humans as well.\textsuperscript{216} Montana, through case law, has applied its right to human health, wildlife habitat, and aesthetics.\textsuperscript{217} On the other hand, Montana litigants lack standing to sue over a proposed land use that \textit{enhances} the environment but could have been designed to enhance the environment even more.\textsuperscript{218} Finally, Hawaii's Constitution also lists several types of resources in its environmental clause, including human health, native Hawaiian values, and non-physical impacts such as social and economic costs to a community.\textsuperscript{219}

Related to definitional scope is the question of geographic scope—the area affected by the proposed land use. Even outside of the environmental rights states, scholars have noted a judicial trend of requiring local governments to examine environmental effects beyond jurisdictional boundaries to all areas affected by a land use decision.\textsuperscript{220} This same logic should apply in environmental rights states since all people within those states are entitled to constitutional protection, regardless of where the cause of an environmental harm originates. Thus, in \textit{Ka Pa'akai O Ka'Aina v. Land Use Commission}, which involved a proposed resort expansion on 235 acres within a special management area, the Hawaii Supreme Court concluded that the LUC should have considered impacts to native rights and cultural resources both within and outside of the development site.\textsuperscript{221} While the LUC imposed a blanket requirement that the developer address native rights within the 235 acres, it failed to analyze or provide for protection of native trails or traditional plant and salt gathering areas outside the development.\textsuperscript{222} Similarly, in \textit{MEIC}, which involved threatened arsenic pollution of an entire riverine system, the Montana Supreme Court did not limit its analysis to the mining site or place of discharge.\textsuperscript{223} The Illinois courts have also declined

\begin{itemize}
\item and fruit orchard owners, as well as the aesthetic intrusion on a nearby inn and residences); Commonwealth v. Gettysburg Battlefield Tower, Inc., 302 A.2d 886 (Pa. Commw. Ct. 1973) (historic battlefield).
\item See \textit{supra} discussion Part II.C and accompanying notes.
\item See Lohmeier v. Gallatin Cnty., 135 P.3d 775, 777–78 (Mont. 2006) (involving allegations that newly created sewer district would provide more environmental protection if it was enlarged to include plaintiffs' lands).
\item See \textit{supra} Part II.D; Molokai Homesteaders Cooper. Ass'n v. Cobb, 629 P.2d 1134, 1143 (Haw. 1981).
\item See, e.g., Reilly, \textit{supra} note 55, at 51–52 nn.120–26.
\item See \textit{Ka Pa'akai O Ka' Aina v. Land Use Comm'n}, 7 P.3d 1068, 1074, 1086 (Haw. 2000).
\item See id.
\end{itemize}
to limit their inquiry to the subdivision site when the impacts of the pollution extend to areas beyond the subdivided property.  

2. **Risks Posed to Environmental Resources**

The approaches to determining environmental risk are broad ranging and cannot be fully detailed in this article. Nonetheless, local governments should proactively decide upon an approach that they can consistently employ in decision making processes. Three important considerations include: (a) factoring in any guidance from the state’s courts regarding environmental evidence, (b) using a reliable methodology that is accepted in the scientific community, and (c) crafting an approach that errs on the side of environmental protection.

Beyond identifying the immediate, direct effects of a land use proposal, the methodology should assess that proposal’s cumulative impacts when placed alongside other existing and proposed land uses in the community. The rationale for cumulative impacts assessment has been summarized aptly by the New Jersey Supreme Court in its discussion of the Pinelands:

That land itself is a diminishing resource cannot be overemphasized. Environmentally-sensitive land is all the more precious. Hence, a proposed development that may constitute only a small insult to the environment does not lessen the need to avoid such an offense. The cumulative detrimental impact of many small projects can be devastating. If exemptions should be granted because development on individual tracts would impair only minutely the entire resources of the Pinelands, the cumulative effect of such exemptions would defeat the legislative goals of the Pinelands Protection Act.

The need for cumulative impacts assessment is particularly warranted in the environmental rights states, which are unanimous in requiring that environmental protection extend to “future generations.”

---

This command is a strong signal that government must look beyond the artificial borders of a single development proposal to the bigger picture of the developing landscape both today and in the future—the very essence of land use planning.

Indeed, cumulative effects assessment is intertwined with and reinforced by comprehensive planning, where communities identify existing land uses and set the direction for future land use proposals. For example, in the Illinois case of City of Springfield v. Hashman, the court looked at the totality of existing and proposed subdivisions in a particular drainage area and determined that the local government correctly denied the Hashmans' subdivision based on the area's inability to handle additional homes using septic systems.\(^{229}\) This evidence was corroborated by the City's comprehensive plan, which called for a phasing out of septic systems in the drainage due to environmental concerns.\(^{230}\)

Among the constitutional rights states, Hawaii has been the most direct about cumulative impacts. The HEPA and its related regulations, which are intended to implement the state's environmental right, and which apply to many land use decisions, specify that the cumulative impacts of existing and proposed uses must be considered in the EA process.\(^{231}\) A similar analysis holds true for water resources subject to the public trust under article XI, section 1.\(^{232}\)

Montana's land use statutes are not as explicit regarding cumulative impacts; however, Montana has begun applying some federal NEPA standards to local government EAs in subdivision review.\(^{233}\) This strongly suggests that the state will follow national trends and treat cumulative impacts evidence as integral to local environmental assessment as well.\(^{234}\) To conclude otherwise would be to undermine full consideration of environmental rights impacts.

Hawaii has also been a leader in requiring consideration of secondary, or indirect, impacts associated with a proposed land use.\(^{235}\) In
Sierra Club v. Department of Transportation, the Hawaii Supreme Court considered whether agency review of state harbor work done in preparation for the private Superferry project must consider the secondary impacts posed by the ferry traffic. The Hawaii Department of Transportation concluded that its harbor work posed only minimal impacts and was thus exempt from HEPA. The court disagreed and held that secondary impacts from ferry traffic must be considered because the Superferry project was "incident to and a consequence of the primary impact" of the harbor work.

Pennsylvania similarly treats secondary effects as relevant, but has a narrower view of what secondary effects are admissible. In Community College, discussed supra Part I, a state board denied the college a permit to run a sewer extension line into an undeveloped watershed that included a state park. While the board concluded that the sewer extension itself posed little environmental impact, it was concerned about the secondary impacts of opening up the watershed to future development. Once sewer service was available, the board noted that local zoning would allow development to occur, causing erosion and siltation, water supply pollution, and loss of open space lands. The court disallowed this secondary effects evidence and defined secondary effects to mean "such conditions as will almost certainly occur as a result of the action taken, and conditions such that current law and technology provide no reasonable means to control them." Anything outside this definition, the court concluded, would be too speculative, including concerns about future local government development approvals. The court appeared to see environmental rights in a bifurcated way, where litigants could later challenge the development itself by separately suing


237. See id. at 331–36.
240. See id.
241. Id. at 479 (emphasis added).
242. See id. The court also noted its belief that environmental harms would be addressed by existing erosion control laws applied at the local level. See id. at 480; see also Swartwood v. Commonwealth, 424 A.2d 993, 996 (Pa. Commw. Ct. 1981) (concluding that state agency need only consider impacts of sewage plan, and not resulting development that would rely on sewage services, because separate litigation can proceed against local government for permitting housing).
local governments for environmental rights violations. Thus, the Pennsylvania rule stands in contrast with Hawaii’s rule in *Sierra Club*.

In Montana, risk assessment must include the possibility that mitigating measures may fail. In *Aspen Trails Ranch, LLC v. Simmons*, a Montana subdivision developer submitted an EA that did not analyze the impacts of sewage on groundwater. The developer assumed that the subdivision would have no impact because of its connection to the municipal sewer. The subdivision, however, had a high groundwater table, and the court concluded that the county committed reversible error by not analyzing the possibility of sewer pipe leakage into the groundwater.

Finally, local governments should be cautious when using categorical exemptions that assume no risk exists for particular land uses. To streamline review, local governments may be tempted to consider identifying land use activities that ordinarily do not create an impact and then exempt those activities from environmental review. But the risk with this strategy is that a particular land use proposal defies the norm and does pose an environmental harm. This puts local government in the same precarious legal position as the agency in Montana’s MEIC decision—relying on a categorical exemption to approve a high-risk permit without appropriate environmental review. Thus, local government regulations must include a safety-valve provision that allows the government to disregard an exemption when environmental harm may occur. One model that could be extended to the local level is the Hawaii Administrative Rule, which forecloses the use of EIS exemptions when there is an unacceptable cumulative impact or an impact on a particularly sensitive environment.

3. *Mitigation of Harm*

Mitigation of harm is also a relevant criterion in all four environmental rights states. Perhaps the clearest example is found in the second part of Pennsylvania’s *Payne* test, which explicitly contemplates mitigation whenever environmental harm occurs with land use. Thus,

---

243. Fox, 342 A.2d at 468; Swartwood, 424 A.2d at 996.
245. See id.
246. See id.; see also Clark Fork Coal. v. Mont. Dep’t Envtl. Quality, 2008 MT 407, 347 Mont. 197, 197 P.3d 482, 491–92 (finding error when agency assumed mining company would perpetually treat mining discharge into Clark Fork River even though company was unlikely to perpetually exist).
247. See supra discussion Part II.C.
248. See HAW. ADMIN. C. § 11-200-8(b) (West 2010).
even if there is not a specific statute or local ordinance that speaks to mitigation, local governments in Pennsylvania must make a "reasonable effort to reduce the environmental impact to a minimum" in order for their decisions to pass constitutional muster. In the context of public trust, Hawaii likewise requires "reasonable measures to mitigate" impacts to resources.

In Montana subdivision review, mitigation is expressly required by statute. If mitigation is not possible, then denial of the subdivision is appropriate. While a local government must consider a subdivider's preferred method of mitigation, it is not obligated to choose methods that do not appropriately address the environmental risk. Outside of subdivision review, the requirement for mitigation is present on a more implicit level, found in passing observations made by the Montana Supreme Court in cases such as Merlin Myers, where the court reminded a local government that it could use its authority to impose mitigating conditions on a gravel extraction permit in order to avoid perceived environmental harms.

With mitigation can come expense to the developer—costs some developers have challenged, albeit with little success. In Illinois, for example, when a mobile home park developer challenged the costs of connecting to the municipal sewage treatment plant, the court said that mitigation cannot be based on cost considerations alone. Rather, it was necessary for the government to consider scientific data, knowledge of technologies, and the application of technical standards as well. And in the Waiahole decision, the Hawaii Supreme Court affirmed a requirement that the water user pay for water studies, so long as the costs were reasonable, because the user stood to benefit from the use of the water.

Finally, as discussed below, the local government must carefully support any mitigating conditions it imposes by making specific findings of fact. Assuming mitigation will occur, or relying too heavily on vague developer promises to mitigate, could constitute reversible error.

251. See Waiahole, 9 P.3d 409, 455 (Haw. 2000).
253. See id.
254. See, e.g., Richards v. Cnty. of Missoula, 2009 MT 453, 354 Mont. 334, 223 P.3d 878, 881–82 (concluding that an electric fence around a subdivision located in an elk migration corridor would be inadequate mitigation).
257. See id.
4. Countervailing Public Interests

To a greater or lesser degree, each environmental rights state also considers countervailing public interests served by the proposed land use. Pennsylvania’s Payne test requires governments to factor in the “benefits derived” from the proposed land use activity. The state has consequently upheld the construction of power utilities, water storage utilities, and a myriad of other activities promising large community benefits despite their environmental detriments.

Hawaii, in the context of public trust, has concluded that government “inevitably must weigh competing public and private . . . uses on a case-by-case basis.” And Montana leaves a small margin of room for considering countervailing interests that are “compelling.” While Montana’s case law has not yet provided an example of what circumstances qualify as compelling in the land use context, the state supreme court has held that such an interest is “at a minimum, some interest of the highest order and . . . not otherwise being served or the gravest abuse endangering a paramount government interest.”

Illinois provides an example of a countervailing interest in the form of safe water supply. In Glisson v. City of Marion, the court began its case description by stating “The City of Marion has a water supply problem.” The proposed land use activity was the damming of Sugar Creek to serve as an alternative water supply for the City of Marion, which had a limited water supply that was of poor quality, requiring “substantial chemical treatment to render it suitable for human consumption.” Agency review under an EIS concluded that the project would be “environmentally sustainable.” The plaintiff, however, argued that the project violated his environmental rights by threatening the habitat of the least brook lamprey and the Indiana crayfish, along with threatening his interests in “food gathering, recreation, and spiritual and educational activities”—interests the court deemed unprotected by the

262. Despite this trend, local governments in Pennsylvania are making some inroads in zoning the location of oil and gas development a significant legal development during a time when Pennsylvania is experiencing significant oil and gas development pressures. See supra note 138.
266. Id.
267. Id. at 1037.
268. Id. at 1038.
environmental rights clause. While the court ultimately dismissed the claims based on lack of standing, its evidentiary emphasis on the City's need for higher quality water is worth noting.

Another possible countervailing interest is needed sewage treatment facilities. The court in Butler Township Board of Supervisors v. Commonwealth upheld a Pennsylvania state agency order requiring three communities to build a sewage treatment plant where an existing sewer system was "aged and deteriorated" and "inadequately treated or untreated sewage" was overflowing into an abandoned mine pit and local creek. The court observed that while the location of the facilities presented some risk of harm due to proximity to drinking water supplies, "the environmental benefits to be gained by implementation of [the] order unquestionably outweigh the environmental harms and adverse effects, if any."271

When a local government chooses to allow a land use because of strong countervailing interests, it may understandably be concerned that the promised public benefits of the proposal may not materialize. In this situation, at least one court has held that it is appropriate to require the developer to fulfill promised benefits as a condition of approval, or risk permit revocation. In Eagle Environmental II v. Commonwealth,272 a Pennsylvania landfill operator listed several environmental and economic benefits that would result if its proposed landfill were built, including habitat rehabilitation and additional jobs for the community.273 There, the state agency applied a harms/benefits analysis before approving the permit.274 The state agency also imposed a condition that stated: "Failure to provide for all benefits described in these submissions would invalidate the Harms/Benefits analysis and will be a violation of this permit."275 The landfill operator argued that the condition was unreasonable because events beyond its control, such as market forces, could cause the failure to provide a predicted benefit.276 Nonetheless, the court upheld the agency's condition because the government has a duty to ensure that the mitigation measures actually result in adequate protection of the environment.277

269. See id. at 1045.
271. Id. at 513.
273. See id. at 871–72.
274. See id. at 872.
275. Id.
276. See id. at 878.
277. See id.
C. Determine the Weight Accrued to the Environmental Right

After gathering evidence concerning the above criteria, a local government must then decide if the land use can proceed in light of any identified environmental risks. This decision turns in large part on the weight the local government places on the environmental right. While some scholars argue that an environmental right should not be balanced against other public interests and deserves "unyielding protection," most recognize that it would be an unworkable standard to halt all land use that intrudes upon the environment because that "demands more than human society is capable of." Indeed, each environmental rights state recognizes that there must as a matter of reality be some consideration of the social values of land use.

Where the states diverge is on the weight given to those countervailing social values. Pennsylvania stands alone in placing more weight on social values than environmental rights; under the third part of its Payne test, the environmental harm must "clearly outweigh" the benefits of the proposed land use. This test furthers the court's stated conclusion that article I, section 27 allows "a controlled development of resources rather than no development." In essence, Pennsylvania has "abandoned the concept of parity between the environmental right and other fundamental rights," preferring to permit [its] citizens to trade some environmental health risks for economic benefits so long as the risk is not too great.

As scholar Daniel Kemmis has observed, "[w]e would be shocked if a court upheld an infringement of free speech because some economic

---

278. E.g., Brooks, supra note 3, at 1066 n.17.
279. Kemmis, supra note 150, at 235–36; see also Robert T. Mann & Richard Jackson, Environmental Protection through Constitutional Amendment, 1 J. LAND USE & ENVTL. L. 385, 404–05 (1985) ("[T]he expression 'healthful environment' does not indicate an absolute, all-or-nothing concept. No one contends that all automobiles must stop and that all impurities must be eliminated... ").
280. For a discussion of this inevitable balancing, see Czarnezki, supra note 158, at 490–94; Thompson, Substantive Guidance, supra note 3, at 872–73; Thompson, Constitutionalizing, supra note 158, at 162, 190–91.
281. See Payne v. Kassab, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973). Even in states with more basic environmental policy provisions, the trend is inapposite to Pennsylvania. In New York, for example, which has an environmental policy statement but no environmental right, the courts have concluded that "if both [environmental and economic] factors were to be placed upon the scales, the Pro bono publico considerations must prevail." Nattin Realty, Inc. v. Ludewig, 324 N.Y.S.2d 668, 672 (N.Y. Sup. Ct. 1971); see also Dep't of Cmty. Affairs v. Moorman, 664 So. 2d 930, 933 (Fla. 1995) ("A personal [property] right does not necessarily supereven the rational concerns of public environmental policy.").
282. Payne, 312 A.2d at 94.
283. Kemmis, supra note 150, at 234–35; see also Pearson & Hutton, supra note 55, at 196; Mann & Jackson, supra note 279, at 413.
284. Brooks, supra note 3, at 1109.
gain outweighed an individual's partial loss of liberty." Scholars taking issue with the Payne test have also argued that "[t]he public well-being is clearly superior to any individual's property rights. All property is subject to the laws which express the public purpose and conscience; for it to be otherwise would expose vast numbers of people to risks with no recourse of prevention." But even in Pennsylvania a landowner does not have carte blanche to disregard all environmental regulation. As the Pennsylvania Supreme Court has observed, landowners "who desire to utilize their property to conduct business in a regulated industry have chosen to subject themselves to regulations." In other words, environmental regulation is an expected part of using land for economic gain. The court has further held that once adverse environmental impacts are raised, the applicant's burden of proof is "intensified." If the government fails to consider and balance environmental harms in its permitting process, it has abused its discretion. Perhaps the final saving grace for local government is the court's recognition in Eagle Environmental II that, so long as some balancing of environmental and social interests occurs, it is not constitutionally mandatory for governments to apply the Payne test. As argued in Part II, this latitude gives a local government the authority it needs to more appropriately weigh and protect environmental rights in its community—particularly when local government decision making receives deferential review under an abuse of discretion standard.

Illinois and Hawaii also appear to balance interests, but place a much greater weight on environmental rights. In the context of article XI, section 1, Hawaii has acknowledged that there is necessarily a balancing between environmental interests and other economic and social factors, but that "any balancing between public and private purposes begins with a presumption in favor of public use." Accordingly, the burden lies with the private developer to justify its use and overcome the presumption. The Hawaii Supreme Court has also said that "under no circumstances" does the constitution allow "minimal scrutiny" of commercial interests

---

290. See discussion supra Part II.B, especially note 132.
291. See id.
292. Waiahole, 9 P.3d 409, 454 (Haw. 2000). Presumably, this constitutional presumption in favor of the environment overlays HEPA's balancing, which requires that the decision maker "make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives." Unite Here! Local 5 v. City and Cnty. of Honolulu, 231 P.3d 423, 444 (Haw. 2010).
293. See Waiahole, 9 P.3d at 454.
when the public trust is at stake. Similarly, Illinois cases and the constitutional commentary state that the right to use property is outweighed by the obligation to maintain a healthful environment.

However, if an environmental right is constitutionally protected, and the countervailing land use interests are not, then a balancing test seems inappropriate. Instead, the threshold question should simply be whether the environmental right is violated. Then, consideration of economic or other social interests does not come in the form of a counterbalancing right, but rather in the form of a secondary question of whether the countervailing interest meets the requisite level of judicial scrutiny. This, in essence, is the Montana test, which treats environmental rights as fundamental and requires a compelling interest before a land use can proceed in the face of environmental harm. In light of this strict scrutiny, scholars note that Montana’s test leaves the least room for economic tradeoffs.

Even if a countervailing property right is constitutionally protected in a particular case, thus necessitating some form of balancing, Montana’s environmental right is placed first in the list of inalienable rights, suggesting that it is paramount. Indeed, the assertion of a property right has yielded to environmental rights in prior decisions. Arguably, in states like Montana and Illinois, where the constitutions place a duty on each person toward the environment, developers take title to property subject to this constitutional duty; in essence, the duty “runs with the land” and encumbers all property.

294. In re Contested Case Hearing (Molokai), 174 P.3d 320, 330–31 (Haw. 2007); see Waiahole, 9 P.3d at 472.
295. See supra note 99 and accompanying text; see also Mann & Jackson, supra note 279, at 413 (discussing Illinois’ use of the constitution to interpret authority broadly in favor of the environment).
296. For similar arguments related to other constitutional rights, see Iddo Porat, The Dual Model of Balancing: A Model for the Proper Scope of Balancing in Constitutional Law, 27 Cardozo L. Rev. 1393, 1396 (2006) (“Are both claims in the conflict first-order claims, in which balancing is appropriate, or does one of the claims . . . function as a second-order claim, in which case balancing is inappropirate?”); Mark Oring & S.D. Hampton, When Rights Collide: Hostile Work Environment vs. First Amendment Free Speech, 31 UWL A. L. Rev. 135, 160 (2000) (“The first step in balancing should be to make sure that it is really necessary and appropriate. . . . Are the rights of equal stature? . . . Constitutional rights should not be ‘balanced’ away unless it is absolutely necessary.”).
297. See discussion supra Part II.C.
298. See Thompson, Constitutionalizing, supra note 158, at 190–91.
299. See MONT. CONST. art. II, § 3.
300. See discussion supra Part II.C., especially note 148.
301. See Mann & Jackson, supra note 279, at 405 (noting that even when a constitution mentions a right to use property, that right “is limited at least to the extent of the obligation to provide and to maintain a healthful environment”). Reserved for future discussion is the related question of whether environmental rights thus constitute a background principle of state law that precludes a takings claim.
Thus, among the environmental rights states there is a spectrum of approaches for weighing environmental rights. But in each state a local government has both an authority and a duty to render land use decisions that consider and protect the community from environmental harm.

D. Determine the Evidence Necessary to Apply the Criteria

Among the more difficult questions confronting a local government is whether it possesses the necessary evidence to analyze environmental harm. Answering this question can be challenging because the types of evidence vary with the circumstances of each land use proposal. Nonetheless, the courts have provided local governments with some general standards that must be met to avoid abuse of discretion.

The Hawaii courts have stated that the governing body must have "[s]ufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision."\textsuperscript{302} Montana similarly requires that local decision makers have enough information to take a "hard look" at the environmental impacts of a project.\textsuperscript{303} Implicit in the "hard look" requirement is "the obligation to make an adequate compilation of relevant information, to analyze it reasonably, and to consider all pertinent data."\textsuperscript{304} Constitutional convention delegates in Montana and Illinois also envisioned that environmental evidence would include medical and technical evidence.\textsuperscript{305} These evidentiary standards are in keeping with statements in early environmental jurisprudence that "ecological considerations [must be] based not on whim or fancy but upon scientific findings."\textsuperscript{306}

When the risk of harm may be great, but the harm cannot be shown with certainty, the cases reflect a judicial trend toward what can loosely be termed a "precautionary principle,"\textsuperscript{307} which affords governments the flexibility to impose safeguards until such time as more information is

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{302} Unite Here! Local 5 v. City and Cnty. of Honolulu, 231 P.3d 423, 444 (Haw. 2010).
\item \textsuperscript{303} See Aspen Trails Ranch, LLC v. Simmons, 2010 MT 79, 356 Mont. 41, 230 P.3d 808, 820.
\item \textsuperscript{304} Clark Fork Coal. v. Mont. Dep't of Envtl. Quality, 2008 MT 407, 347 Mont. 197, 197 P.3d 482, 492.
\item \textsuperscript{305} See Tobin, supra note 71, at 479, 479 nn.31–32 (citing to the convention records of both Illinois and Montana).
\item \textsuperscript{306} See supra notes 16–18 and accompanying text (quoting Nattin Realty, Inc. v. Ludewig, 324 N.Y.S.2d 668, 672 (N.Y. Sup. Ct. 1971). For an in-depth discussion regarding the sufficiency of scientific evidence in land use, see generally Mudd et al., supra note 226; see also Julie Lerum Joly et al., Recognizing When the "Best Scientific Data Available" Isn't, 29 STAN. ENVTL. L.J. 247 (2010).
\end{itemize}
\end{footnotesize}
known. For example, in Waiahole, the state water commission lacked sufficient evidence to determine whether water rights applicants could use the water without causing public harm. The commission thus ordered the applicants to contribute to the costs of stream studies and monitoring to determine whether the permit criteria were satisfied. The Hawaii Supreme Court upheld the condition under the precautionary principle:

Where scientific evidence is preliminary and not yet conclusive . . . it is prudent to adopt “precautionary principles” in protecting the resource. That is, where there are present or potential threats of serious damage, lack of full scientific certainty should not be a basis for postponing effective measures to prevent environmental degradation . . . . In addition, where uncertainty exists, a trustee’s duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource.

As with any general principle, its meaning must vary according to the situation and can only develop over time. In this case, we believe the Commission describes the principle in its quintessential form: at minimum, the absence of firm scientific proof should not tie the Commission’s hands in adopting reasonable measures designed to further the public interest.

In the lodestar opinion of Ethyl Corp., the United States Court of Appeals for the D.C. Circuit upheld the Environmental Protection Agency’s authority to regulate in the face of scientific uncertainty:

Regulators such as the [Commission] must be accorded flexibility, a flexibility that recognizes the special judicial interest in favor of protection of the health and welfare of people, even in areas where certainty does not exist.

Questions involving the environment are particularly prone to uncertainty . . . . Yet the statutes—and common sense—demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable.

Undoubtedly, certainty is the scientific ideal—to the extent that even science can be certain of its truth . . . . Awaiting certainty[, however,] will often allow for only reactive, not preventative, regulation. Petitioners suggest that anything less than certainty, that any speculation, is irresponsible. But when statutes seek to avoid environmental catastrophe, can preventative, albeit uncertain, decisions legitimately be so labeled?

308. Waiahole, 9 P.3d 409, 495–96 (Haw. 2000).
309. See id.
310. Id. at 426 (quoting conclusions of law of the state water commission).
311. Id. at 467.
So defined, the precautionary principle simply restates the Commission's duties under the constitution.312

Thus, according to the Hawaii Supreme Court, the precautionary principle is a necessary part of implementing environmental rights and should be applied when governing bodies confront situations of uncertain evidence and high environmental risk.

Pennsylvania has also embraced the precautionary principle in the context of local government standing to sue to prevent environmental harms. In Franklin Township, discussed in Part 1.B, the court not only upheld local government's right to sue the state regarding a toxic waste landfill permit, but it proceeded to describe the importance of preventing harm before it occurs: "Toxic wastes which are deposited in the land irrevocably alter the fundamental nature of the land . . . . We need not wait until an ecological emergency arises in order to find that the interest of the municipality and the county faced with such a disaster is immediate."313 Montana's MEIC case also espoused a form of the precautionary principle: "Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protection can be invoked."314

Even in those cases not expressly mentioning the precautionary principle, the courts have made clear that an environmental harm need not be definitely proven for a local government to exercise its police powers. The Illinois case City of Springfield v. Hashman315 is illustrative. There, developers proposed a twenty-lot residential subdivision with septic tanks on each lot.316 The subject property was near a marsh that drained into Sugar Creek and then Lake Springfield—the source of the community drinking water supply.317 The property also contained soils "rated as having moderate to severe limitations for septic tank seepage fields and the probability of effluent drainage into Sugar Creek [was] great."318 Some nearby properties had already experienced septic system leakage.319 The City denied the proposed development and a trial court reversed the decision, critiquing the City for not proving that the septic systems would actually pollute Lake Springfield.320 The appellate court,

312. Id. at 466–67 & n. 59 (emphasis omitted) (some internal citations omitted).
316. See id. at 430.
317. See id.
318. Id.
319. See id. at 434–36.
320. See id.
however, upheld the City’s decision on appeal, holding that the “possibility” of septic failure and pollution of the water supply was sufficient evidence to support the City’s decision.\textsuperscript{321} The Pennsylvania courts have likewise upheld zoning that excludes uses “likely to” cause pollution of municipal water supply.\textsuperscript{322}

Expressing a similar sentiment, the Montana Supreme Court in \textit{Madison R.V., Ltd. v. Town of Ennis} held that a local government need not have “definitive professional testimony” before denying a recreational vehicle park that could overload the town’s sewage system and place the nearby Madison River and its fishery at risk.\textsuperscript{323} Observing that there was “considerable testimony raising serious questions about the effect of adding a recreational vehicle park’s waste to the Town’s sewage treatment system,” the court upheld the government’s decision.\textsuperscript{324}

Although the courts have not expressly adopted a sliding scale measurement, it is possible to conclude that one exists regarding proof, where less certainty of harm is required as the significance of the resource increases. For example, in \textit{Tri-County Landfill Co. v. Illinois Pollution Control Board},\textsuperscript{325} the Illinois Pollution Control Board ordered two landfill companies to terminate leachate and pollution discharge from their sites.\textsuperscript{326} The discharge was entering an upper aquifer that was separated from a lower aquifer by a layer of clay.\textsuperscript{327} The lower aquifer served as a water supply source for South Elgin, Illinois.\textsuperscript{328} There was mixed evidence presented on the permeability of the clay, and the Board issued the order based on a “substantial threat of water pollution to the lower aquifer.”\textsuperscript{329} The Board concluded it would not “tolerate this danger, notwithstanding the fact that the time may be distant when such pollution would, in fact, take place.”\textsuperscript{330} The landfill operators argued that the Board lacked substantial evidence to support its decision.\textsuperscript{331} The appeals court disagreed, holding that:

\textit{[T]he Board must be allowed to act where the conduct may endanger the safety of the citizens, there is no assurance that it will not [occur] . . . and the result if the potential danger were to be realized would be}

\textsuperscript{321} See id.
\textsuperscript{323} Madison River R.V. Ltd. v. Town of Ennis, 2000 MT 15, 298 Mont. 91, 994 P.2d 1098, 1102–03.
\textsuperscript{324} See id.
\textsuperscript{326} See id.
\textsuperscript{327} See id.
\textsuperscript{328} See id. at 320.
\textsuperscript{329} Id.
\textsuperscript{330} Id.
\textsuperscript{331} See id. at 318.
serious. The Board here reasonably found that allowing the discharge with no knowledge or assurance of the results was a water pollution hazard considering the nearness of the well and the gravity of the result which may well occur.\footnote{332}{Id. at 324.}

This same logic is seen in another Illinois case, \textit{Village of Glencoe v. Metropolitan Sanitary District}, where an appeals court upheld a district's authority to ban waste discharges that were "even likely to pollute" waters of Lake Michigan, notwithstanding the lack of actual proof that harmful pollution would result.\footnote{333}{Vill. of Glencoe v. Metro. Sanitary Dist., 320 N.E.2d 524, 527–28 (Ill. App. Ct. 1974).} The court emphasized that the waters there were particularly vulnerable: "[T]he problem is especially serious because the pollution of Lake Michigan is practically irreversible."\footnote{334}{Id. at 324.} The importance placed on the severity of the potential harm in these cases, as compared with the level of evidence required, indeed suggests a judicial sliding scale of proof, albeit an implicit one.

Finally, the cases support the position that a land use applicant bears the burden of providing the evidence necessary for a full environmental review. In Hawaii, an applicant must overcome a presumption in favor of the environment\footnote{335}{Id. at 324.} and bears the burden of establishing that the proposed use will not interfere with any public trust purposes.\footnote{336}{See Waiahole, 9 P.3d 409, 454 (Haw. 2000).} Under HEPA the applicant bears the burden as well.\footnote{337}{Id. While the courts appear to apply a precautionary approach in Illinois, the exception would be where the state legislature has limited standing to challenge certain agency permits, discussed \textit{supra} Part II.A.} In the words of the Hawaii Supreme Court: "[W]hen inconclusive allegations raise a specter of harm that cannot be dispatched by readily available evidence," the burden is on the applicant to show no harm or an acceptable level of harm.\footnote{338}{Id. at 324.} Further, when an applicant does not meet its burden, the governing body should stop its analysis rather than grant a permit.\footnote{339}{Vill. of Glencoe v. Metro. Sanitary Dist., 320 N.E.2d 524, 527–28 (Ill. App. Ct. 1974).} Granting approval based on a lack of evidence of harm constitutes an impermissible shift of burden onto the government or other parties asserting environmental rights.\footnote{340}{Vill. of Glencoe v. Metro. Sanitary Dist., 320 N.E.2d 524, 527–28 (Ill. App. Ct. 1974).}

In Pennsylvania, the applicant carries the burden under the \textit{Payne} test, and when adverse environmental impacts are raised, "the applicant's burden is intensified" and the government "must be satisfied" that the
Payne test is met. The Montana Supreme Court has stated that an applicant’s failure to provide sufficient evidence regarding environmental harm can result in the voiding of a development approval, particularly when the applicant fails to include existing environmental studies and information.

E. Make Findings of Fact that Show the Environmental Right Was Considered

As the local government makes evidentiary findings, a logical but sometimes overlooked best practice is to make specific findings relating to environmental rights. Failing to make these findings can constitute reversible error. In Ka Pa‘akai O Ka‘Aina, for example, Hawaii’s LUC authorized the reclassification of 1000 acres of land from “conservation” to “urban,” which would have allowed Ka‘Upulehu Developments (KD) to expand a luxury resort onto lands traditionally used by native Hawaiians for fishing and gathering purposes. Before authorizing the reclassification, the LUC neglected to do the requisite factual inquiry into the “identity and scope” of the native resources, the extent the resources would be affected, and how the native rights could be reasonably protected. The Supreme Court of Hawaii held:

A review of the record and the LUC’s decision leads us to the inescapable conclusion that the LUC’s findings and conclusions are insufficient to determine whether it discharged its duty to protect customary and traditional practices of native Hawaiians to the extent feasible. The LUC, therefore, must be deemed, as a matter of law, to have failed to satisfy its statutory and constitutional obligations.

The Pennsylvania courts have followed a similar logic, holding that it would be arbitrary and capricious for the government to issue a decision

---

342. See Aspen Trails Ranch, LLC v. Simmons, 2010 MT 79, 356 Mont. 41, 230 P.3d 808, 812–15, 820–21 (affirming trial court decision to void preliminary plat when developer EA was lacking required information such as existing groundwater studies); see also Clark Fork Coal. v. Mont. Dep’t of Envtl. Quality, 2008 MT 407, 347 Mont. 197, 197 P.3d 482, 491 (finding an abuse of discretion where agency fails to use its discretion to demand additional relevant evidence).
343. Ka Pa‘akai O Ka‘Aina v. Land Use Comm’n, 7 P.3d 1068, 1074 (Haw. 2000). Although the case involved native gathering rights, the holding is instructive regarding the failure to issue findings when a constitutional right is implicated. For a discussion of the use of native constitutional rights in environmental rights analysis, see supra Part II.D.
344. Ka Pa‘akai O Ka‘Aina, 7 P.3d at 1084.
345. Id. at 1085; see also In re Water Use Permit Application (Moloka‘i), 174 P.3d 320, 334 (Haw. 2007) (remanding to state water commission for failing to explain why private commercial water use took precedence over public trust water use under article XI, section 1).
without considering “environmental and ecological factors.” Similarly, in Montana it is arbitrary for a local government to make no environmental findings when the weight of the evidence shows serious environmental concerns associated with a development proposal.

F. Do Not Delegate Review Duties to the Applicant or Approve a Development Contingent on Future Review of Environmental Rights

Although the applicant carries the evidentiary burden regarding environmental evidence, the government cannot rely solely on the applicant to assess the environmental harms posed by a land use proposal. The ultimate duty to conduct a full environmental review lies with the local government and cannot be delegated. Nor should the review be deferred to some future date after an approval has issued. *Ka Pa'akai O Ka'Aina* is again instructive. There, when the LUC authorized reclassification of conservation lands for a resort expansion, it required that the developer “preserve and protect any gathering and access rights of native Hawaiians,” without identifying those rights or explaining how they would be preserved and protected. The Hawaii Supreme Court reversed:

This wholesale delegation of responsibility for the preservation and protection of native Hawaiian rights to KD, a private entity . . . was improper and misses the point. These issues must be addressed before the land is reclassified.

. . . .

. . . The LUC’s verbatim adoption of KD’s conceptual [plan] and [the landowner’s] future study, without any analysis of the project’s impact, violates the LUC’s duty to independently assess the impacts of the proposed reclassification on such customary and traditional practices.

. . . [The LUC’s condition of approval] . . . confers upon KD the unfettered authority to decide which native Hawaiian practices are at issue and how they are to be preserved or protected . . . after the

---


347. See Greater Yellowstone Coal., Inc. v. Bd. of Cnty. Comm’rs, 2001 MT 99, 305 Mont. 232, 25 P.3d 168, 173 (upholding the district court’s decision). Below, the district court voided the local government zoning decision, concluding there was “nothing in the record” and “scant evidence in the record” to support the local government’s finding of public benefit. The evidence showed just the opposite—that the “extremely sensitive nature of the Duck Creek parcel and its importance to wildlife habitat . . . is a significant factor to be weighed in evaluating the public welfare . . . .” Findings of Fact no. 98–100, Conclusions of Law no. 21, Greater Yellowstone Coal., Inc. v. Bd. of Cnty. Comm’rs, Cause No. DV-96-331 (Mont. Dist. Ct. Apr. 19, 2000).

348. See Ka Pa’akai O Ka’Aina v. Land Use Comm’n, 7 P.3d 1068, 1086–89 (Haw. 2000).
development is complete, at some undetermined time and under indeterminate circumstances.

. . . [A] private petitioner . . . unlike a public body, is not subject to public accountability. Allowing a petitioner to make such after-the-fact determinations may leave practitioners of customary and traditional uses unprotected from possible arbitrary and self-serving actions on the petitioner's part. After all, once a project begins, the pre-project cultural resources and practices become a thing of the past.349

In another Hawaii case, Molokai, the state water commission granted a groundwater use permit to a private commercial user with the condition that the user conduct a feasibility study for alternative water supply sources in the future.350 Although alternative supply is a threshold question, the permit allowed immediate withdrawals from the Kualapu'u aquifer, which was close to full allocation and faced risks of increased chlorides and drawdowns.351 The court held that the permit condition was "fundamentally at odds" with the commission's constitutional duties and that the feasibility of alternative supply should have been considered before a permit was granted: "The commission cannot fairly balance competing interests in a scarce public resource if it renders its decision prior to evaluating the availability of alternative sources of water."

The Montana Supreme Court employed a similar analysis in Aspen Trails Ranch, LLC by holding that the county in that case could not rely on a subdivision developer's presumption of no environmental harm when granting preliminary plat approval.353

G. Plan to Monitor for Ongoing Compliance

When a land use is deemed compatible with environmental rights and is allowed to proceed, the local government arguably has an ongoing duty to ensure that the permitted activity actually occurs in a manner that does not harm environmental rights. Again, Hawaii has been the most outspoken on this issue. In Kelly v. 1250 Oceanside Partners, the court held that a county's constitutional duty under article XI, section 1, is "to not only issue permits after prescribed measures appear to be in

349. Id. (footnotes omitted); see also Kahana Sunset Owners Ass'n v. Cnty. of Maui, 947 P.2d 378, 386-87 (Haw. 1997) (holding that it was erroneous for City to delegate environmental review responsibility to another agency or concerned members of the public when City was the agency granting approval of a proposed development).

350. Molokai, 174 P.3d 320, 326, 335 (Haw. 2007).

351. See id.

352. Id. at 335; see also Waiahole, 9 P.3d 409, 472 (Haw. 2000) (finding error when commission deferred rigorously scrutinizing a water use application until some future date when resources were more scarce).

353. See supra notes 244-247 and accompanying text.
compliance with state regulation, but also to ensure that the prescribed measures are actually being implemented . . . .354 There, the county unsuccessfully argued that it could exercise its discretion in choosing whether to monitor a subdivision construction site for compliance with state erosion and runoff requirements.355 And in Morgan v. Planning Department, the court upheld a County of Kauai decision to modify an existing special management area permit that had allowed a sea wall on private properties.356 After the sea wall was built, it began causing erosion on neighboring properties, so the county imposed new conditions requiring redesign of the sea wall.357 The permit holders argued that the county lacked authority to revoke or alter an issued permit, but the court concluded that the county has ongoing jurisdiction over permits under the CZMA and the Hawaii Constitution.358

As Eagle Environmental II illustrates, Illinois similarly acknowledges that there is an ongoing duty to ensure compliance and that it is appropriate for government to revoke a permit if environmental harm exceeds that contemplated under the permit terms.359 And the Montana Supreme Court has held that an agency abused its discretion when it assumed that a mining company would perpetually treat pollutants released from a mining adit, without specifically providing for how ongoing compliance would occur.360

A final, related issue deals with delays between the time an approval is issued and the time the developer actually commences the development of the land—a frequent reality in the fluctuating marketplace. This issue is exemplified by the case of Unite Here! 5 Local v. City and County of Honolulu, where a resort developer received approval to significantly expand a resort but then delayed completion of the proposed project for over twenty years.361 The developer argued that the original project EIS could continue to apply, despite the fact that in the intervening years the environmental variables around the property had changed, including increasing reliance on the property by endangered and threatened species.362 The Hawaii Supreme Court ruled

357. See id.
358. See id.; see also Waiahole, 9 P.3d 409, 453, 471–72 (Haw. 2000) (upholding condition on water use permits that allows water commission to revoke or modify permit in the future as constitutional obligations may require).
362. See id.
that "timing" is a key factor of an environmental review and environmental issues associated with the property had changed over time, thus necessitating a new review process. Practitioners can draw an important lesson from this case by clearly delimiting the time period covered by a development approval and requiring developers to submit new materials if development is delayed.

***

The topics discussed in this Part reflect a set of common considerations faced by local governments in the environmental rights states. Although there are differences among the states, particularly in the scope and weight of the environmental right, practitioners can observe remarkable commonality among the states in areas such as the precautionary principle, applicant burden, mitigation requirements, and the ongoing duty of monitoring for compliance. This discussion is admittedly only the beginning of what will necessarily be a much deeper analysis of each local government's planning and regulatory documents. And with literally hundreds of local governments working through this regulatory design process, the communities in these four states will be able to benefit from the uniquely local and innovative approaches their peers are taking to implement environmental rights.

CONCLUSION

Local government is the next frontier in environmental rights protection. The local governments in environmental rights states are poised to become leaders in this endeavor by creating and implementing robust environmental land use provisions. Yet that leadership has been lacking to date. Whereas state agencies in Illinois, Pennsylvania, Montana, and Hawaii have integrated environmental review into selected areas of state purview, local governments continue to leave their environmental authority largely unexercised. Exercising this authority is not an option, but rather a constitutional mandate that reaches every level of government. Absent local action, the people of environmental rights states do not enjoy the full scope of protection guaranteed them by their constitutions.

Local governments will use a variety of approaches in fulfilling their constitutional mandates, including strengthening their planning documents, codifying review criteria, clarifying evidentiary requirements in the application process, and planning for an ongoing role in monitoring developer compliance after permits issue. These steps will necessarily be

363. See id.
informed by reviewing statutory enabling authority and case law, as well as taking matters to court when other agencies or particular statutes may impact a community’s environmental health. In this process, practitioners among the environmental rights states will be able to benefit from studying the differences among the states, as well as the common themes that serve to inform the regulatory design of all the states.

Even as environmental rights approach their fourth decade of existence, we are still defining their contours and import. But that process of ongoing discovery should not hinder local governments from responding to their constitutional calling now. Be it a “constant and difficult task,” the time has nonetheless come, if indeed it is not already overdue, for local governments to assume their rightful role in protecting environmental rights.364