

Table of Contents

About the Author	xi
Acknowledgments	xii
Foreword (by Robert Verchick)	xiii
Preface	xvii
Chapter 1 — Climate Change Bubbles	1
I. Cities on the Bubble.....	1
II. Why Read This Book? Choosing to Succeed	4
III. Bubbles, Bubbles Everywhere	6
A. Drought.....	6
1. Kansas.....	6
2. Oregon	7
3. The Southwest	7
B. Sea-Level Rise	8
1. Louisiana	8
2. Florida	9
3. Hudson Valley—New York.....	10
C. Thin Ice: Alaska	10
D. Natural Disasters.....	11
1. Tennessee	11
2. New York/New Jersey.....	12
E. Wildfires: California	12
F. Extreme Heat.....	13
1. Illinois	13
2. Long Island.....	14

G. Weird Weather: Wine Country	15
H. Increased Rainfall.....	15
1. Washington	15
2. Maryland	16
3. Louisiana	17
I. Effervescence: The Disappearance of Billions of Birds.....	17
IV. The Land Use Stabilization Wedge—Tools Close at Hand	18
Chapter Two — The Evolution of Land Use Law	21
I. From Nuisance Law to Uniform Zoning.....	22
A. The Need for Public Regulation of Land Use—The First Comprehensive Zoning Law	22
B. The Delegation of Legal Authority to Adopt Zoning.....	23
C. Zoning Was Contagious, but Was It Constitutional?.....	26
D. The Unintended Consequences of Euclidian Zoning.....	28
E. The Most Appropriate Use of the Land.....	30
II. Toward Flexibility: The Challenge of Sprawl and Ecosystem Decline	32
A. The Surprising Origins of Smart Growth.....	32
B. The Advent of Local Environmental Law	35
C. Regionalism and “Wistful Hoping”	37
D. Mixed Signals: Exclusionary Zoning and Fairness	39
E. The Emergence of the Law of Sustainable Development.....	42
III. Memorializing Sustainability	45
A. Designing Density	45

B. Green Infrastructure.....	47
C. Land Use and Energy Conservation.....	49
D. Transit-Oriented Development.....	52
E. Zoning for Solar and Clean Energy.....	54
IV. Tackling Climate Change.....	56
A. Fracking as an Industrial Use Under Zoning?	56
B. Water Scarcity and Land Use Planning.....	59
C. Shaping and Attracting Economic Development	62
D. Open Space Zoning Turns to Sequestration	65
E. Land Use Law and Climate Change Management....	67
Chapter Three — Low Carbon Land Use: Paris, Pittsburgh, and the IPCC.....	71
I. Low-Carbon Land Use: A Natural Evolution of Local Practice	71
II. A Theoretical Understanding of Grass-Roots Power	75
III. Emerging Global Support for Local Solutions.....	79
IV. Mitigating Climate Change: The Land Use Connection	84
V. Implementation: The Land Use Stabilization Wedge.....	88
A. Buildings Contribute 35% of CO ₂ Emissions in the United States	89
B. Transportation—Personal Vehicles Contribute 19% of CO ₂ Emissions	92
C. Sequestration—Captures 18% of Domestic CO ₂ Emissions	94
D. Distributed Energy—Lost in Transmission	96
E. Renewable Energy—Community Power	98
VI. Resilience and Other Corollary Benefits of Localism ...	101
VII. Conclusion.....	103

Chapter Four — Waiting for SCOTUS: Negotiating in Transition	105
I. <i>Tempora Mutantur</i>	106
II. Changing Climate, Institutions, and Strategies	110
A. Uncertain Forces Affecting the Rate of Climate Change and Sea-Level Rise	111
B. Changes in Institutions.....	116
1. Regional Greenhouse Gas Initiative.....	117
2. Transportation and Climate Initiative: Building Sustainable Communities	119
3. California Air Resources Board	121
C. Changes in Strategies	123
1. Negotiated Dispute Resolution and Rulemaking.....	123
2. Incentives for Sustainable Development to Mitigate Climate Change.....	125
3. Negotiated Settlements in Lieu of Regulation ...	127
4. Statutes That Embody Stakeholder Negotiations.....	128
III. Sea-Level Rise Confronts the Legacy of <i>Lucas</i>	130
A. Sea-Level Rise	130
B. The Legacy of <i>Lucas</i>	134
C. Reinterpreting the Legacy of <i>Lucas</i> in a Changing Environment	135
1. Public Trust and the Doctrine of Waste.....	136
2. Natural Use Doctrine.....	137
3. Permitting Minimal Use of a Parcel.....	138
4. Changes in the Regulatory Environment.....	139
IV. Easing the Transition: Above Regulations.....	139

A. Comprehensive Planning.....	140
B. The Project Application Process.....	142
C. Environmental Impact Review	143
D. Project Approval Conditions	144
E. Contingency Bargaining.....	145
V. Conclusion: The Role of Lawyers and Legal Education	147
Chapter Five — Extreme Adaptation: Disaster Planning and Mitigation.....	151
I. Disaster Planning.....	151
II. First Affected and First to Respond: Local Disaster Planning	155
A. Understanding the Scope of Local Land Use Control.....	155
B. The Federal Role in Disaster Planning and Mitigation.....	156
III. State and Local Partnerships	159
IV. Local Planning for Resilient Neighborhoods	164
A. Traditional Land Use Techniques and Disaster Planning	164
B. Land Use Tools Applied.....	166
1. Comprehensive Planning.....	166
2. Project Application Process	167
3. Environmental Impact Review	168
4. Project Approval Conditions	169
5. Contingency Bargaining	171
V. Disaster Planning and Implementation Local Case Studies	172
A. City of Lewes, Delaware	173

B. City of Santa Cruz, California.....	174
C. Delaware City, Delaware.....	175
D. Kings County, California	176
E. City of Berkeley, California	177
F. City of Boise, Idaho	178
G. Kootenai County, Idaho.....	179
H. Wilbarger County, Texas	180
I. Louisville Metro, Kentucky	181
J. Clarke County, Virginia.....	182
K. Hawaii County, Hawaii	183
L. City of Bainbridge Island, Washington	184
M. Town of Duck, North Carolina	185
N. Manitou Springs, Colorado.....	186
O. Jackson County and the City of Ashland, Oregon	187
VI. Conclusion: Linking Levels of Governance	188
Chapter Six — Troubled Waters and the Problems With Federalism.....	191
I. Introduction.....	191
A. A Watershed Moment	191
B. The “Occult” Origins of Water Law.....	192
C. Fragmentation of Water Law: Troubled Waters	194
D. Local Solutions	195
E. Collaborative Subsidiarity.....	196
II. Understanding the Land Use Impacts on the Water System	198
A. Connectivity of the Waters of the United States....	198
B. Land Use and Development—Impacts on Water Quality	200

1. Surface Water Impacts From Poor Development Practices	200
2. Sediment Pollution and Cultural Eutrophication	201
3. Environmental Impacts to Soil Structures Due to Construction	202
III. Waters of the United States—Gaps in Governmental Jurisdiction	203
A. Waters of the United States	203
1. Surface Water.....	205
2. Groundwater.....	207
3. Nonpoint Source Pollution	208
B. State and Local Jurisdiction: Filling the Gaps.....	210
IV. The Police Power in Practice: Local Solutions	214
A. Local Government Initiatives	214
B. Comprehensive and Topical Land Use Plans	215
C. Zoning.....	217
D. Site Plan Regulations	218
E. Water Conservation	219
F. Local Nuisance Laws.....	222
G. Mandatory Well Testing.....	223
H. Stormwater Remediation Fee.....	224
V. Correcting Parochialism Through Collaboration	225
A. State-Provided Technical Assistance	225
B. State-Mandated Impact Review	226
C. Bottom-Up Intergovernmental Cooperation	227
D. State-Created Intermunicipal Initiatives.....	228
E. Intergovernmental Watershed Planning	229
F. Larger Regional Networks.....	231

G.	Top-Down Required Collaboration	232
H.	Lessons Learned in Using Local Land Use Power ...	233
VI.	Conclusion—Toward a Principle of Collaborative Subsidiarity	234
	A. <i>De Facto</i> Localism and Its Theoretical Supporters	234
	B. Opposition to Exclusive Localism	239
	C. Support for Collaborative Localism.....	240
	D. The Principle of Collaborative Subsidiarity	243
Chapter Seven — Societies Choosing to Succeed		247
I.	Bubbles as Agents of Change.....	247
II.	Complex Adaptive Systems and the Process of Societal Change	250
III.	The Expansion of Municipal Land Use Authority.....	253
IV.	Choosing to Succeed.....	257
V.	Conclusion: An Agenda for the Future of Land Use Planning and Regulation.....	259
Chapter Eight — Pandemic Postscript.....		265
I.	Yet Another Beginning for Land Use Law: The Pandemic.....	265
II.	What Can Be Done?	271
III.	Who Is in Charge? Emergency Powers and Property Rights	273
IV.	Racial Justice and Public Health.....	275
V.	The Police Power and Property Rights.....	276
VI.	Conclusion.....	283
Table of Cases		285
Index		287