Stormwater Management: The Legal Role of State and Local Governments



Federal Stormwater Management Requirements and Pollution

- Point source pollution prevention
- Within Federal power over interstate commerce
- Nonpoint source pollution prevention historically is a within the legal control of state and local land use governments
- Because MS4s are owned and operated by local governments, the federal Phase II Stormwater Management Program requirements expands Federal control to nonpoint sources of surface water pollution

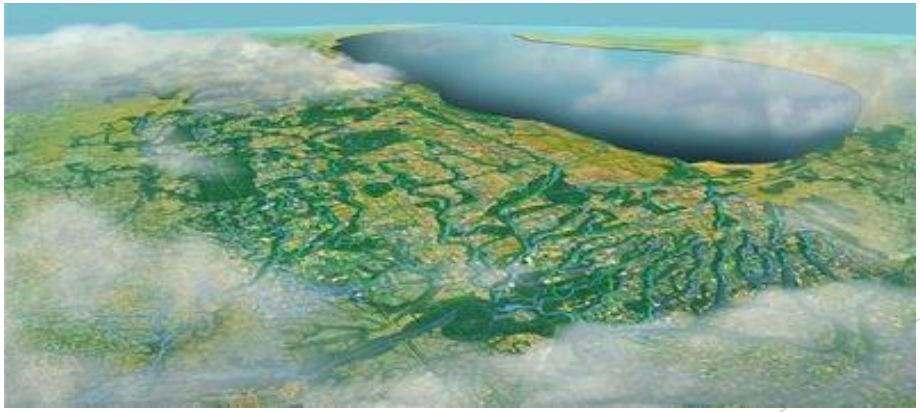
Review of Land Use Regulatory Framework

- Comprehensive plan
- Zoning requirements and incentives
- Subdivision regulations
- Site plan regulations
- Conditions imposed on project approvals
- Enforcement of conditions



Comprehensive Plan

Planning 101: if you add a stormwater management component to the local comprehensive plan, all zoning and land use regulations that manage run-off will conform with the plan, which they must do under state law: all land use regulations must conform with the comprehensive plan



Traditional Zoning = Encourages Impervious Coverage

Impervious coverage prevents water infiltration on-site and speeds up the flow of stormwater off-site, worsening flooding and pollution downstream.

Single-family zoning regulations may allow, for example, 40% impervious coverage.

Half acre zoning = 20,000 sq. feet x 40% = 16,000 sq. ft. of building and pavement

Zoning Requirements and Incentives

- Zoning itself can be reformed to protect against non-point source pollution from stormwater.
- Low impact development means less impervious coverage.
- Zoning can require or incentivize green infrastructure to retain and otherwise manage stormwater.

Subdivision Regulations

It is in subdivision regulations that low impact development can be insinuated, requiring detention, retention, vegetative swales, retention of vegetation, etc.



Site Plan Regulations

Similarly, site plan regulation can require low impact development using the same techniques.



Conditions Imposed on Project Approvals

To manage stormwater, conditions can be imposed on site plan and subdivision approvals

The local legislature can impose such conditions on rezonings as well

Special use permit standards can limit impervious coverage and require low impact development

Enforcement

- No building permit or certificate of occupancy is awarded if the stormwater management conditions are not complied with.
- Localities are adopting post-occupancy enforcement standards requiring that inspections be done a year or more after occupancy to demonstrate continued compliance.



Legal Authority for Adopting Such Laws

The Municipal Home Rule Law – Article 2 §10 permits local laws for the "protection and enhancement of the physical and visual environment"

Town, Village, and the General City Law permit localities to adopt plans, zoning, and land use regulations to achieve "the most appropriate use of the land."

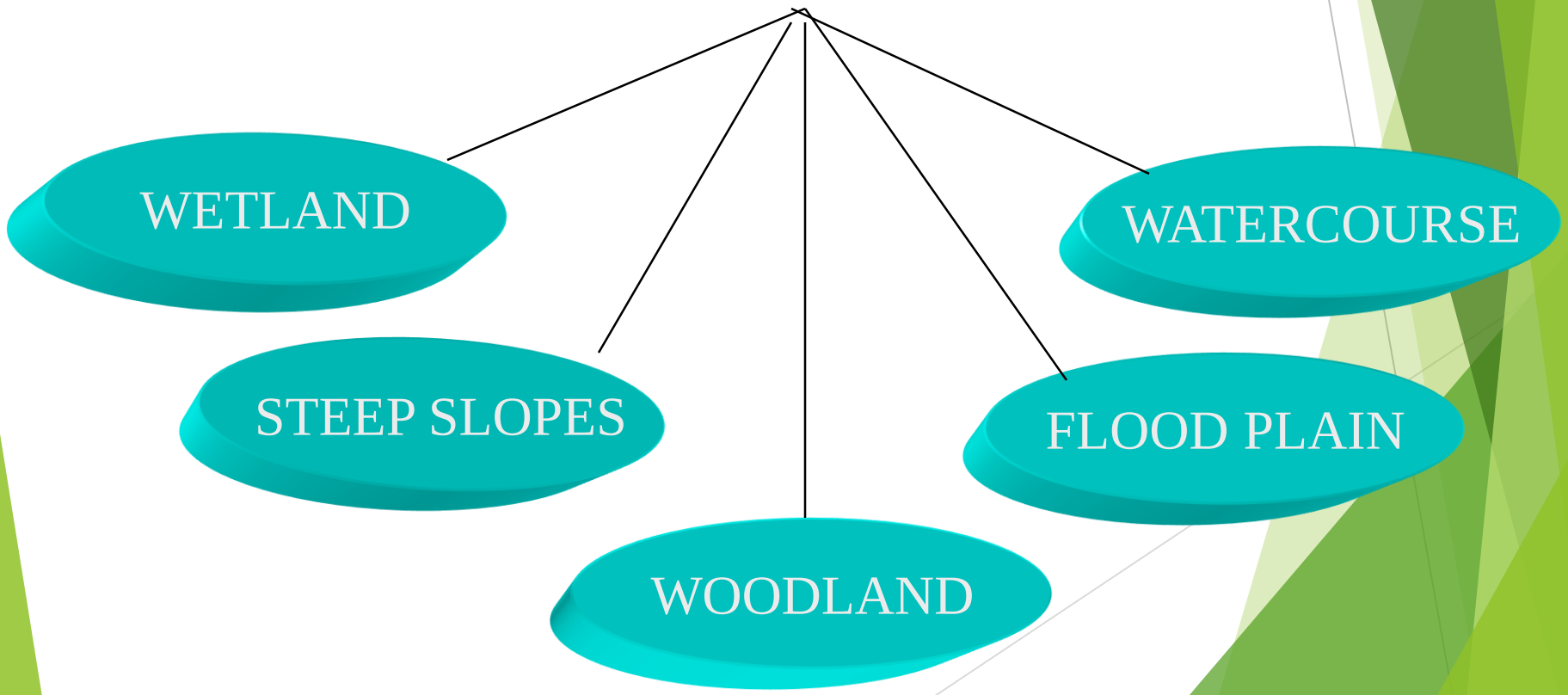
Both of these laws are broadly interpreted by the courts, giving great flexibility to municipalities

Options

1. Overlay Zoning
   - Leaves existing zoning in place & establishes standards for specific resources, such as flood plains
2. Conservation Zoning Districts
   - Changes Zoning to Conservation Uses and Standards that prevent off-site pollution
3. Cluster Zoning or Subdivision
   - Pulls development away from vulnerable areas
4. Incentive Zoning
   - Gives developer more density to pay the costs of measures that reduce runoff

TOWN OF PENNFIELD
MONROE COUNTY

HAS ADOPTED FIVE OVERLAY ZONES



Conservation Zoning

- A new district: CR
- Defined by environmental function
- Its boundaries are that of a watershed around two lakes
- Environmental standards built into the zoning, such as larger lots and less coverage.
- Wetlands preservation required as is
- Retention of the vegetated environment

Natural Resource Regs

Localities may adopt laws to protect the physical environment.

- Floodplain regulations
- Erosion and Sedimentation controls
- Steep slope limitations
- Ridgeline protections
- Wetlands controls - allows protection of wetlands as small as one-half an acre.

The Role of DEC Re: Stormwater Management

Under Federal Law: State may assume responsibility

Under NY State Law: DEC Issues Permits for MS4s

State Assistance Programs:

- Stormwater Design Manual
- Model Local Law
- DEC Maps

DEC Design Manual

- NYS Stormwater Management Design Manual – See Chapter 5 – over 100 pages of Green Infrastructure practices to choose from.
- Includes Preservation of Undisturbed Areas, Preservation of Buffers, and Open Space Design, in addition to the engineered on-site practices like rain gardens, green roofs, and stormwater planters.

DEC Model Laws

- 2016 Model Local Law for Erosion and Sediment Control and Stormwater Management
- There are 2 versions – one has stronger optional community resiliency provisions.

Model Law Goal

The goal of providing the model law is to assist communities in amending existing laws and ordinances and/or adopting new provisions of local law to meet the new federal and state guidelines for stormwater control.

Some Contents:

- Erosion and Sediment Control and Stormwater Management
- Performance and Design Criteria
- Maintenance, Inspection and Repair of Stormwater Facilities
- Amendment to Subdivision Law
- Amendment to Site Plan Review Law
- Green Infrastructure Planning and Techniques Acceptable for Runoff Reduction