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Environmental Control

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ENVIRONMENTAL CONTROL INTRODUCTION*

WHEN the University of Denver enrolled its first law students 75 years ago, controlling the environment meant settling the West, building the institutions of civilization on the frontier. Now, on the occasion of the law school's 75th anniversary, we can flatly say that the *city* is the frontier. Water and air pollution, the threat of pesticides, and a vanishing natural landscape are crises which need no elaboration to most of us.¹

Managing the quality of our environment ultimately involves some measure of restriction on human behavior and the free use of property. Restriction can mean zoning for five-acre minimum housing lots to preserve the country club look of a neighborhood, or limiting family size to preserve enough earth for man to live on. What kinds of property enjoyment and behavior are restricted depends on the felt necessity for action to improve the quality of the environment. We may still call the pleasant looking neighborhood an amenity, a luxury. But we are beginning to consider population growth a threat to acceptable living conditions which eventually must be faced.

The ends of environmental control are identified and catalogued in the political process by the priorities society gives to each. How government prosecutes these controls is the issue which has challenged democratic legal thought since long before law reviews began to discuss the subject.² Seldom has this issue been phrased more ably than in a speech to the American Society of Planning Officials by the vice-president of Litton Industries. He said:

It is unfortunate that socio-economic planning has so long been identified with a loss of individual freedom, the growth of central government, and even the oppression of totalitarian regimes. We should be trying to make it precisely the opposite. The future should be subject to democratic processes just as current issues are. It is no

* The editors are grateful to Loren L. Mall, formerly Note Editor of the *Journal*, for his work in planning this issue and transforming a "rough idea" into a collection of articles.

¹ See U.S. DEP'T OF INTERIOR, *MAN: AN ENDANGERED SPECIES?* (1968); F. DARLING, *FUTURE ENVIRONMENTS OF NORTH AMERICA* (1966); S. UDALL, *THE QUIET CRISIS* (1963).

² See Cribbet, *Changing Concepts in the Law of Land Use*, 50 *IOWA L. REV.* 245 (1965).

less irresponsible and unwise for citizens to ignore the future than to ignore the present. It is instant in the present. Great changes will erupt from it in kaleidoscopic succession whether or not we attempt to shape it.

And what if we do not attempt to shape it? Will our air, our water, our land unfoul themselves? Will our urban environment for everyday living — for education, recreation, aesthetic satisfaction, the development of community responsibility — improve itself?³

Legal research and writing which recognizes our environmental ills, particularly the urban condition, is increasingly apparent in the periodicals,⁴ casebooks,⁵ services,⁶ and more general studies.⁷ This gratifying new attention comes largely from existing specialized fields of law. But the challenge which will confront legal education⁸ is the creation of generalists — urbanists some call them — capable of seeking solutions to a wide range of social ills once the private domain of caseworker or comprehensive planner.

Professional planners were recently told by one of their pioneers:

Because the younger generation has recognized the problems of urbanization as a critical aspect of man's future, more idealists are entering the field . . . once claimed by the glamorous or more established professions. . . .

While this augurs well for the . . . future, neither the existing planning faculties nor the written study material is equal to the challenge. Some of the great old timers are either dead or time-worn. The current crop of teachers came into the field as architects, landscape designers, housing reformers, lawyers, or specialists in one of the related areas. Meanwhile, the scope of urban planning has expanded so extensively in recent years that the existing corps of teachers is hard put to keep up with it.⁹

³ Rubel, *Fate or Freedom*, in *PLANNING* (1967), at 6. See also Cribbet, *Some Reflections on the Law of Land — A View from Scandinavia*, 62 *NW. U. L. REV.* 277, 312-13 & n.100 (1967); Reich, *The Law of the Planned Society*, 75 *YALE L.J.* 1227 (1966).

⁴ See, e.g., *Symposium: The San Francisco Bay Area — Regional Problems and Solutions*, 55 *CALIF. L. REV.* 695 (1967); *Land-Use Symposium*, 50 *IOWA L. REV.* 243 (1965); *Urban Problems and Prospects*, 30 *LAW & CONTEMP. PROB.* 1 (1965); *Land Planning and the Law: Emerging Policies and Techniques*, 12 *U.C.L.A.L. REV.* 707 (1965); *Symposium: New Towns*, 1965 *WASH. U.L.Q.* 1.

The interest of legal writers in the environment is also reflected in the trend to specialized format law reviews. The Universities of New Mexico, Wyoming, and Detroit now publish law reviews which devote major attention to the subject area. They are, respectively, the *Natural Resources Journal* (begun in 1963), the *Land and Water Law Review* (begun in 1965), and the *Journal of Urban Law* (begun in 1966).

⁵ E.g., D. MANDELKER, *MANAGING OUR URBAN ENVIRONMENT: CASES, TEXT AND PROBLEMS* (1966). To see how this casebook fills a need beyond older, more specialized materials and confronts the "total urban problem" see Tarlock, *Book Review*, 20 *J. LEGAL ED.* 117 (1967).

⁶ A noteworthy new contribution is CCH, *URBAN AFFAIRS REPORTER* (Spring, 1968).

⁷ E.g., E. MURPHY, *GOVERNING NATURE* (1967).

⁸ Compare Clark, *Teaching Resources Law*, 18 *J. LEGAL ED.* 165 (1965) with Tarlock, *supra* note 5, at 117-18 n.2. An example of the "total environment" approach is discussed in McAuliffe, *The Urban Law Program of the University of Detroit*, 20 *J. LEGAL ED.* 83 (1967).

⁹ Abrams, *Present Labor Pains in Planning Education*, 34 *ASPO NEWSLETTER* 1 (Jan. 1968).

The task in legal education, we submit, is no less great. While we have the engineering know-how to clean up the water and purify the air with filters other than our own lungs, and while we have some of the legal tools to implement needed environmental controls, there is evidence that new tools and the statesmanship to use them will be demanded of the legal community in the future. As Charles Haar reminded us, "American society freely turns to law for solutions to even its most incommensurable problems. The legal profession can translate into specific workable programs this body of ideas which is the common heritage of all professions concerned with the development of the American city in the best interests of the public."¹⁰ Furthermore, the immediacy of urban problems has not diminished our national interest in preserving the beauty of the countryside. The legal profession also has an important legislative and administrative role to play in protecting rural landscapes from undesirable and, in many cases, irreversible change.

Each of the articles collected in this issue illustrates a specific workable program of environmental control. Likewise, each in some manner raises the fundamental dilemma of subjecting controls to the democratic process. The nature of a technical solution to any immediate problem might temporarily require undemocratic action, but as Commissioner Stein's paper illustrates, the enlightened government will seek to alleviate such situations by good judgment and compromise. Michael McCloskey, conservation director of the Sierra Club, tells of the values and issues in preserving forest aesthetics in the face of increasing commercial demands—demands resisted or accommodated largely by administrative action which sometimes has been neither democratic nor wise.¹¹ Professor Cunningham's article on scenic easements explores the modern use of an ancient property concept for improving the appearance of our highways, to the benefit of millions of travelers.

Other problem areas considered by our authors touch more directly on fundamental freedoms, as does the health inspector's conflict with search and seizure protections discussed by Mr. Sidney Edelman, Chief of the Environmental Health Branch, Office of the General Counsel in the Department of Health, Education and Welfare. Professor Delogu goes beyond an expression of commonly shared concerns for the vanishing open space around our cities. He proposes some novel uses of taxation, one of the oldest instruments of control, to build a more attractive environment.

These papers were selected by the board of editors to be typical, not exhaustive, of the issues and problems in environmental control.

¹⁰ Haar, *Foreword to Land-Use Symposium*, 50 IOWA L. REV. 243, 244 (1965).

¹¹ See Reich, *supra* note 3, at 1230-70.

Even so, they teach us that in the future, at each place where man is finally able to apply a solution to an environmental defect, a legal issue of some magnitude is likely to take shape around the then "required" change in the individual exercise of human and property rights.

It is in the spirit of challenge, then, that we dedicate this issue of the *Denver Law Journal* to the faculty of the University of Denver College of Law, and to the members of the Denver and Colorado Bar Associations. It is they and we who will soon join them who must lead the profession in applying the values of our legal system to the need for a quality future living environment for us all.

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